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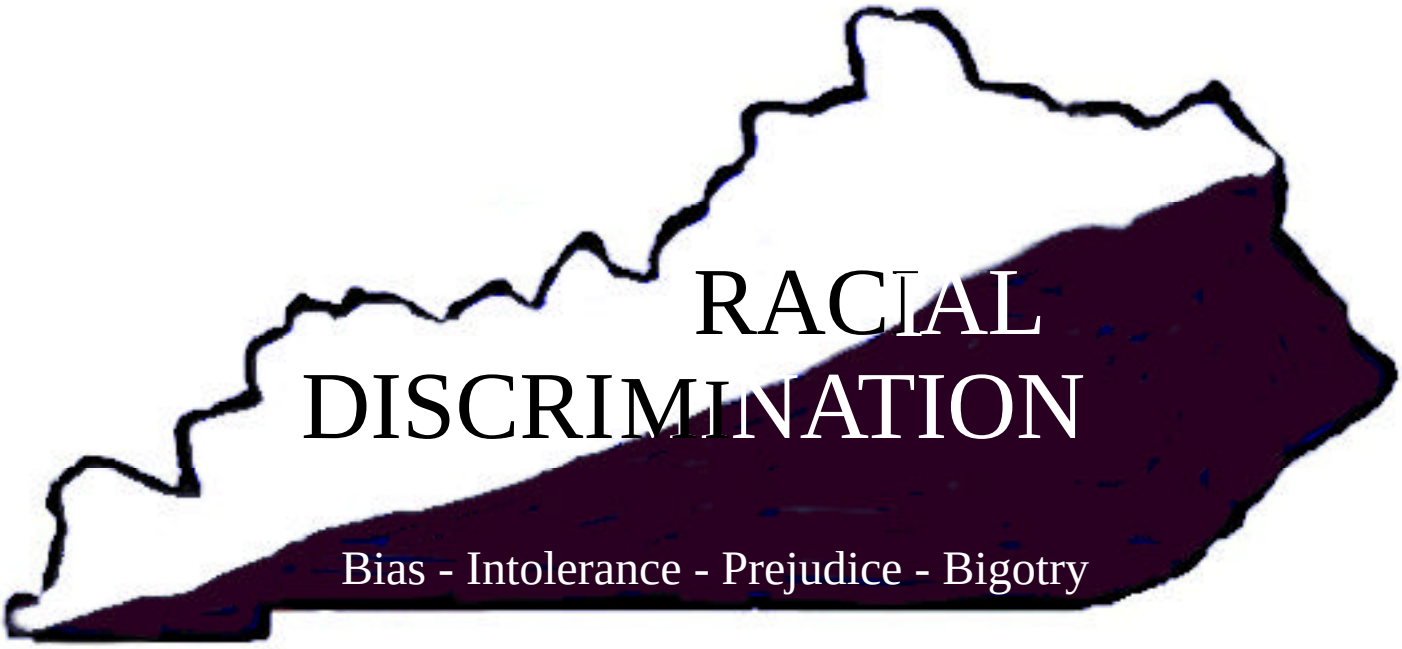
WHAT DOES RACE HAVE TO DO WITH IT?



Racial bias influences every aspect of the criminal justice system. African-Americans, Latinos and members of other racial minorities are more likely than similarly situated white people to be stopped by the police, to be arrested after being stopped, put in choke holds by arresting officers, denied bail, denied probation and given harsher sentences including the death penalty.

--Steve Bright

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Table of Contents

CORRECTION: In our last issue we published a marvelous article authored by Bryce H. Amburgey entitled, "The Economy-Crime Rate Connection and Its *Affect* on DPA caseloads: Does crime Pay When the Market Doesn't?" As editor, I changed *Effect* to *Affect* and in doing so misused the word. I want to correct the record and let our readers know that mistake was mine as editor and not the author's. As the *New York Manual of Style and Usage* (1999) at 10-11 states, "The verb *affect* means influence or change…. The verb *effect* means accomplish or carry out…. The noun used more often is *effect*, meaning a result or a consequence…. The rarely used noun *affect* means an emotional response or feeling." Ed Monahan

The Advocate:
Ky DPA's Journal of Criminal Justice Education and Research

The Advocate provides education and research for persons serving indigent clients in order to improve client representation and insure fair process and reliable results for those whose life or liberty is at risk. It educates criminal justice professionals and the public on defender work, mission and values.

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FROM THE EDITOR...

Ed Monahan

We could declare that race has nothing to do with our criminal justice system in Kentucky. We could maintain that race is never inappropriately used in the prosecution of a criminal case in our Commonwealth. We could profess that race never affects what we do when we represent a client. But we know the reality is otherwise. Race is a multifaceted, complicated, complex problem in our Kentucky criminal justice system which prides itself on fair process and reliable results no matter who you are or what you look like. We do not like to think about race, talk about race, or confront what we have to do about race. *But we must.*

Kentucky has an unpleasant history of racial violence, which is context for today's criminal justice system. Consider this simple comparison. While Kentucky has a nonwhite population of 8%, its nonwhite incarcerated population is 36%, its nonwhite death row population is 17%, and its nonwhite incarcerated juvenile population is 41%. Some of our clients are racially profiled, despite the statutory prohibition. Some are prosecuted for a capital offense due to racial discrimination, despite our Kentucky Racial Justice Act.

Frederick Douglass sees it clearly, "Justice is often painted with bandaged eyes. She is described in forensic eloquence as utterly blind to wealth or poverty, high or low, black or white, but a mask of iron, however thick, could never blind American justice when a black man happens to be on trial." How do we see it?

As criminal defense litigators, our own experiences and views of race influence us, often unconsciously. Some of our good public defender litigators report that is difficult or impossible to look the prosecutor in the eye and argue that there is racial discrimination in the prosecution of their client even though facts support that defense. Some of our good litiators fear raising issues of racial discrimination because they feel it would not be possible to practice successfully in that court and with that prosecutor and judge if they make that claim based on the facts as they see them.

This issue of *The Advocate* seeks to help litigators be more aware of the issues of racial discrimination in their cases and to help equip them with strategies and effective skills in litigating those issues in ways to persuade the factfinders and decisionmakers. This issue is dedicated to all our clients who have been unfairly discriminated against because of their race, and is an invitation to all of us to a greater awareness of racial discrimination of our clients. Enjoy the articles. Please give us your reactions.

Ed Monahan, Editor

WHAT DOES RACE HAVE TO DO WITH IT? A Presentation to Kentucky Public Defenders

Lenny Castro

Introduction

Last year I had the honor and privilege to be part of the Kentucky Public Advocate Annual Meeting in Lexington. I was invited to share my thoughts on how race plays a part in our justice system and more importantly, what we as public defenders can do to recognize and minimize the negative impact it may have on your client. Race and culture can, and in many cases does, play a significant part in charging, prosecution, conviction and sentencing of our clients. In this article I attempt to put in writing some of what I shared in Lexington. It is an attempt to provide criminal defense attorneys with suggestions and strategies to use when involved in a case where race might be a factor.

Issues of race in our justice system are not unique to any one jurisdiction. In Minnesota, black males are incarcerated at a rate of 23:1 to that of white males. Kentucky has grappled with issues of race in a variety of ways. It has reviewed both local and national studies and has passed laws to combat this very real and visible disparity. It is now up to criminal defense lawyers, both public and private, to put those studies and current state laws to work for our clients. I hope the following provides some guidance in that regard. Part I lists applicable laws, Part II examines various stages of prosecution and the problems related to cases involving racial profiling, Part III identifies some cultural issues in criminal defense work, and Part IV attempts to explain why we must ethically engage in this discussion and advocacy.

I. Applicable Laws

A. The Kentucky Constitution

The Kentucky Constitution, in Section 1 and 2, provides for freedom from arbitrary governmental interference and equal treatment under the law. It has language demanding equality, liberty, safety, and protection from arbitrary use of governmental power. Racial profiling and discrimination runs contrary to these constitutional protections.

Kentucky Constitution, Section 1.

> All men are by nature free and equal, and have certain inherent and inalienable rights, among which may be reckoned:
>
> First: The right of enjoying and defending their lives and liberties.
>
> Third: The right of seeking and pursuing their safety and happiness.

Kentucky Constitution, Section 2.

> Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.

These are very unique and powerful provisions that can give a defender persuasive arguments. The right to enjoy and defend one's liberty, and the prohibition regarding arbitrary power particularly intrigues me. Has it been argued under Kentucky law, that the arbitrary request for consent to search is an exercise of arbitrary power over the lives of free men and women?

B. Kentucky Racial Justice Act (KRJA)

The Kentucky Racial Justice Act states, in pertinent part, that,"[i]f the court finds that race was the basis of the decision to seek the death sentence, the court shall order that a death sentence shall not be sought." KRS 532.300. Although, the KRJA is designed to address racial disparity among death row defendants exclusively, it may open the door to other non-death racially based policing, prosecution or sentencing. While it may not be the authority upon which to place the claim for relief, it could provide support for an argument. If "racial considerations played a significant part to" arrest, seek a life sentence, etc. one should consider using the Act in support. This Act can be used on behalf of clients of all races. It has been explained to me that some prosecutors may seek the death penalty or more severe sentences against whites when the victim is a person of color in an effort to show their "fairness" or political motives. Regardless of the motivation, this Act may be relevant and helpful.

A word of caution: the KRJA shifts the burden of proof to the defendant and imposes a standard of "clear and convincing evidence." When arguing non-death claims this standard can not apply. Don't allow prosecutors and courts to shift the burden. This is clearly the same type of difficulty faced when bringing motions under the Federal Equal Protection Clause.

C. Prohibition Against Racial Profiling: Model, Policy and Local Law Enforcement Policies KRS Section 15A.195

The Racial Profiling Act states in relevant part that "No state law enforcement agency or official shall stop, detain, or search any person when such action is solely motivated by consideration of race, color, or ethnicity, and the action would constitute a violation of the civil rights of the person." KRS 15A.195(1). On its face, this statute is a significant tool to defend against racial profiling. The courage of the legislature to introduce and pass such a statute, however limiting, is a

reflection of the recognition that something must be done.

Some of the difficulties within the Act are obvious but not insurmountable. For example, the burden of proof is on the defendant claiming that racial profiling led to their arrest or charge. The "solely motivated" language creates a high standard of proof that may be difficult to meet. And, the Act does not provide for a definition of a civil rights violation (this also leaves the opportunity for expansion of the traditional federal definition of a civil right). One statutory definition of "civil rights" is found in Kentucky's Title XVII of the Security and Public Welfare Chapter. It defines "civil rights" as "the ability to vote, serve on a jury, obtain a professional or vocations license, and hold an elective office." KRS 196.045(3). This definition is limited in its scope and application. Careful consideration must be therefore given when attempting to define the violation. A final point of concern is that the Act (as do many other statutes) does not provide a remedy to the defendant if a violation is proven.

Notwithstanding these limitations, the use and benefits to victims who are targeted based on race outweigh the difficulties of finding relief under this statute. The benefits are threefold: First, the Act names race as an issue in police work. This gives the defense the "permission" to raise the issue of race, opens the race debate and requires the Commonwealth to respond. Second, this statute is broad in its application. It does not only address a race based "stop," but also applies to race-related detention and searches. This is significant in the context of levels of intrusion. The temporary detention period for persons of color is often prolonged by more intrusive questioning. Many police departments keep data on stops and detention times. Use their data to prove your point. The series of additional questions that police may put to a black male may be different that those of a white female (*e.g*. Do you have a gun?, Do you mind if I look in your trunk, etc.). These additional questions constitute prolonged detentions and are many times a product of race. Third, and probably most important, is that the Act gives the client legal standing where state of federal laws would not. This is especially true for passengers of vehicles, guests in homes, etc. This statute can be used to provide the standing to introduce other issues that otherwise would be unavailable.

Proving that race or ethnicity was the basis of a stop, detention or arrest is easier said than done. Nevertheless, one should attempt to discover evidence of discriminatory practices by:

- Examining the police officer's and prosecutor's language when describing the facts of the case.
- Checking the prior conduct and complaints of the particular police department.
- Investigating the particular officer's past conduct for trends and habits in how they conduct their work.
- Reviewing public data and statistics on searches, charging policies and practices, booking practices, and bail considerations. In some jurisdictions home monitoring equipment requires a defendant to speak English into the voice recognition system, otherwise they stay in jail.
- Reviewing the work of The Kentucky Commission to Review Racial Fairness as a source of data about racial bias in the courts.

The Act also requires law enforcement agencies to develop plans to prevent race-based stops, and provides protocols for revision of a plan. Here are some things you should do:

- Make sure that a law enforcement agency does not modify its plan without the proper approval.
- Ask for a copy of the discipline action plan for officers who are not in compliance with the Act.
- Force the design and implementation of the model policy.
- Make a discovery demand of the implemented or adopted plan.

We, as defense lawyers, must use the tools the law provides. Our failure to be innovative and persistent raises real questions of competency and ethics.

D. The Federal Equal Protection Argument

The Federal Equal Protection Clause has been one of the legal theories most used in the effort to combat racial profiling. Unfortunately, it has not been very successful. The reasons for this are twofold:

- Defendant has burden of proving purposeful discrimination; and
- Defendant has the burden of proving that the purposeful discrimination had a discriminatory effect on *him or her.*

Public defenders in Minnesota were successful using the state constitution equal protection provision to argue that equal protection is violated when the effects of a law, although unintended, treat a similarly situated class differently. *See State v. Russell*, 477 N.W.2d 886 (Minn. 1991). The selective discrimination enforcement of a racially neutral law can also constitute a violation of the equal protection clause of the United States. *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct 1064 (1886).

II. Critical Stages

A. The Arrest and Consent: Challenging Racial Profiling by Eliminating Arbitrary Consent Searches

- Use New Federalism to find additional protections. See, Christo Lassiter, *Eliminating Consent from the Lexicon of Traffic Stop Interrogations*, Cap. U.L. Rev. 79 (1998).
- Use adequate and independent state constitutional grounds to base new protections.
- Copy what is happening in other states. Courts are starting to recognize police abuses. For example:

Continued on page 6

Continued from page 5

- No further inquiry should be made once the reason for the initial stop is dispelled. *Minnesota v. Hickman*, 491 NW2d. 673, 675 (Minn. App. 1992). (That the initial stop, while constitutional, did not establish the constitutionality of the later intrusion and prolonged detention. The court found that once the reason for the stop was dispelled, any further questioning was constitutionally impermissible).
- Police must record in-custody interrogations. *Minnesota v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994). This decision came after a series of warnings by the courts to police.
- Placing limits on police ability to arrest. *State v. Varnado*, 582 NW2d 886 (Minn. 1998).
- Request to search the mouth of defendant for drugs was an unreasonable request. *State v. Hardy*, 577 N.W.2d 212 (Minn. 1998).

B. The Jury Selection Process

Much of the litigation surrounding race is in the context of jury selection. The following are some important factors to consider when selecting a jury:

- *Batson* held that the prosecutor's use of his preemptory challenges to strike blacks was a violation of the Sixth and Fourteenth Amendment, because it would exclude blacks from participation in jury service solely based on their race. *Batson v. Kentucky*, 476 U.S. 79 (1986).
- *Batson* applies both to prosecutor and defendant. *Georgia v. McCollum*, 505 U.S. 42 (1992).
- White defendants can object to excluding black jurors. *Powers v. Ohio*, 499 U.S. 400 (1991).
- Excluding a juror based on race in civil or criminal trials is an Equal Protection Violation. *Edmonson v. Leesville*, 500 U.S. 614 (1991).
- *Equal protection analysis also applies to gender. J.E.B. v. Alabama, 511 U.S. 127 (1994).*

Clearly, the most difficult obstacle many lawyers have in voir dire is getting a juror to admit racial prejudice. Is that really what you want them to do? Given that the rules for jury selection differ between jurisdictions, I make the following suggestions:

- Explain to jurors that racial prejudice is not racism—help them understand the difference by sharing some personal experiences.
- Acknowledge your understanding of the difference and how that makes up your value system. There is courage in recognizing our prejudices. This will remove some of the fear.
- Don't judge the jurors on this topic – this is exactly what you are asking them not to do. The real racists will scream out at you. These are generally obvious and can be removed.
- Talk about life experiences—get them talking about the experience of being a person of color.
- Share your fears with them—the fear that the defendant's or witness's race will affect their decision.
- You cannot free the jury of all bias—don't think you can.

Jurors want to do the right thing and will decide a case based on their life experiences. They do not want to believe that their decisions are based on their prejudices and biases, but rather on what is right and wrong. We all decide what is right and wrong based on our morals, biases and prejudices. It is important that you talk about race without being offensive. This extends throughout voir dire – don't be condescending. Yes, you went to college and law school and many of them didn't, but they might send your client to prison or death. A juror's lens of justice is put in focus by what they know about life and by what is important to them. Help them see your client through your lens.

Here are some questions you should ask of the court administration:

- Are proper juror summoning procedures being followed?
- Are the excused and eliminated jurors causing a disparate impact?
- Are juror questionnaires used when appropriate?—this may help with the embarrassing situations.

Finally, find out all you can about the prosecutor's past practices—get transcripts. In challenging race, the court's focus must be on the prosecutor's credibility. If available, you should also have someone help you record race, gender, appearance, and answers of jurors. It is extremely important that you make a record and get a full hearing on the challenges.

III. Cultural Issues in Criminal Defense Work

Client cultural issues must be considered whenever arguing totality of the circumstances claims or potential mental state factors. Consider the following when representing a client of different race, culture, or ethnicity:

- Cultural factors may invalidate the *Miranda* waiver. Consider whether the client is from a country where any resistance to government authority may be futile. Did the client understood not just the language, but also its meaning.
- Language difficulties are always relevant in understanding waiver and its consequences. If the client did not understand the meaning and implications of the waiver, the waiver may not be knowingly.
- Length of time in the U.S. may be a good indicator whether or not the client was able to understand the ramifications of waiving his/her rights.
- Examine what efforts law enforcement undertook to ensure (obstruct) understanding. Ask whether the arresting officer made any effort to ensure that your client understood

the words and meaning of a waiver. Did the officer make sure that your client had the language skills, as well as the cultural knowledge.

- Some aliens work and live in the U.S. for many years without taking part in U.S. culture. Many ethnic groups do not assimilate into U.S. culture and surround themselves with their own culture and transitions.
- Inquire into your client' s cultural attitude towards government and law enforcement. Persons whose human rights were violated by government officials in their country of origin are likely to cooperate fully with arresting officers.
- Was a qualified interpreter used? Ensure that your interpreter is qualified. Often non-native interpreters delete important nuances in translating statements.

IV. The Ethics of it All

The ethical requirement to litigate race in Kentucky can be found in SCR 3.130, Kentucky Rule of Professional Conduct 1.1 Competence and its comments. It states in part that "A lawyer shall provide competent representation to the client ... [this] requires thoroughness and preparation...." Paragraph 5 of the Comment to that rule states "[c]ompetent handling of a particular matter includes inquiry and analysis of the factual and legal elements of the problem ...." Race is many times a factor in the arrest and detention of our clients. Our failure to expose this fact does not give the client the defense or representation demanded. Some would suggest that a defense attorney's effort to expose these racial factors is prohibited by our duty not to racially disparage others. If a defense attorney is well prepared and has determined that race is a factor, the disparagement argument is without merit. Your efforts cannot be focused on calling a policeman, prosecutor or judge racist, but rather you should ask yourself the following questions:

Q. Does my failure to raise the issue of race violate my client's constitutional or statutory rights?
Q. Does my failure to inform my client of this potential defense violate my ethical obligations to inform?
Q. Is my ethical obligation to competently investigate and raise legitimate defenses violated by my failure to consider race?

In the end, you may win, lose or offend, but you will definitely be representing your client ethically, professionally and responsibly.

V. Future Action and Legal Reform

Public defenders must always be proactive in seeking legal reforms. The following suggestions may provide a starting for action.

First, the "totality of circumstances" test must be eliminated from the consent analysis and replaced with a *Terry* type "suspicion" standard.

Second, the U.S. Supreme Court's holding in *Leon*, which conceptualized, police in search and seizure matters as objectively neutral must be countered by the reality and state law. State courts have found evidence to the contrary. In *George* the Minnesota Supreme Court found that "police officers are using increasingly sophisticated and subtle tactics to elicit consent from motorists." *State v. George*, 557 N.W.2d 575 (Minn. 1997). An example of such subtle tactics, a method of questioning known as "rolling no's" is discussed in *United States v. Badru*, 97 F.3d 1471, 1475 (D.C. Cir. 1996). While some state courts are willing to conceptualize police as a subjective, deterministic force whose value system is expressive of a complex set of human biases, others are not. I call upon each defense lawyer in Kentucky to move to create new law expanding protections.

Making New Law

- Find Commonwealth common law decisions where subtle changes made greater protections apply.
- Determine under which independent state ground to proceed (due process, equal protection, Section 1 or 2 of the Kentucky Constitution)
- Put together as many local, state and national studies that show the biases present in our criminal justice system.
- Find the area that gives police arbitrary and capricious motives and that the courts have cautioned against in the past. Focus on one area.
- Litigate, litigate, litigate . . . .

You Must Create a Record

- Put the police under oath every chance you get.
- Just say no to the good-old-boy chats off the record.
- Identify the bad cops and go after them—do not paint all law enforcement with the same brush.
- Try something new—you might hit a gold mine.

In any analysis regarding race you must start with yourself. Consider your prejudices and how they affect decisions you make about your client. Then you must talk to the client about issues surrounding race and culture. Not only will they appreciate your willingness to understand their culture (thus building trust) but you might learn something that will be helpful in their defense. Finally, consider the discretionary factors and practices of police, prosecution and courts. They all keep data that might be very helpful in your client's case. ■

Leonardo Castro is the Chief Public Defender in Hennepin County, Minneapolis, Minnesota. He was assisted in the development of this article by Elizabeth Royal, a third year law student at the University of Minnesota and a Law Clerk at the Hennepin County Public Defender's Office.

Race is a Factor

Senator Gerald Neal

Gerald A. Neal,
State Senator, 33d District, and Louisville Attorney:

I really respect what you do as public defenders. I watch what you do across the state and deal with some budgetary matters that impact you from time to time. But, I don't envy the job that you undertake. Your profession is a very difficult one and often under very difficult circumstances. I want to acknowledge that and let you know that we appreciate what you do, notwithstanding some of my colleagues, who don't quite understand that in a democracy it is essential that you have a vibrant capacity to provide defense for all in that society.

Race is a factor in every aspect of life in the United States of America and in most parts of the world, if not all parts of the world. Right now, every day, you are making decisions based on race. You either eliminate things or you add things in because of race. You are putting your rose colored lens on and you are taking your rose colored lens off. There are no decisions in this society where the consideration of race is not taken into account either consciously or subconsciously. Now, that's a very significant statement.

Stop and think about it. Most people that I make that statement to take the position, "Oh no, not me, I'm not like that." It has been mentioned about being uncomfortable in this process of dealing with questions of race. No one wants to be branded a racist except those that live by that creed openly and consciously. But, the fact of the matter is that we make decisions to do and not to do things each and every day because of race:

- where we live,
- where we shop,
- who we associate with,
- what we accept, and
- what we don't accept.

It goes beyond that, though, because as a result of its historical reality, it's been institutionalized tremendously. One aspect of it is the way rock cocaine vs. powder cocaine is dealt with in the criminal justice system. But it manifests itself in many different ways. I'm going to focus on three of these ways.

Disproportionate Minority Incarceration. Institutionally, there is an issue with disproportionate minority incarceration. That is a huge problem right here in Kentucky. It is being studied right now and I am raising this for two reasons.

One, I want you to stay cognizant of the fact that there is going to be information coming out in the future dealing with disproportionate minority incarceration.

Secondly, those who represent juveniles, in particular, should begin to bring these issues up as they learn more about the reasons for the disproportion. Those same kids that come through the system on their level are your future clients too. The system itself really operates against them in many ways. You may want to begin to look at how race impacts the decisions that are made that ultimately end in a juvenile being locked into the system. Many of them are literally locked into the system. You probably know it better than I do.

Racial Justice Act. Some time ago in 1998 we passed the Racial Justice Act with the assistance of my colleague, Representative Jessie Crenshaw, that enabled statistical evidence and other forms of evidence to challenge the process of race being utilized as a determining factor as to why someone was put at risk of the death penalty.

Some people felt, and even I did at the time, that it was a moral statement to pass that particular piece of legislation. It was a statement about the system. It was confirmation, in some respect, that in this system we have race as a factor and now we are officially dealing with that particular issue.

But, as I began look at it, and I spoke at different places around the country, with respect to the Kentucky Racial Justice Act, it became obvious to me that actually this was more than a statement. This was something, that if not utilized, if not used as an instrument, if not raised as a matter of priority in the defense of individuals who are put in the track of being subjected to capital punishment, then actually it did not mean a thing.

I felt good when I passed that bill, I got a chance to get up on the floor of the Senate and make statements. But, the reality is that the bill means nothing unless those who were in the position to utilize it, use it. Now, some people might not utilize the Act because they say, you know, "I don't see how I can get to that. I don't have the resources to raise it." But, I wonder how many just really do not believe that race is a significant or a determining factor in what happens in some aspect of our criminal justice system.

I cannot find anything where race is not a factor. Oh yes, you can always say there are other factors and maybe more predominant factors. But, I don't think you can separate out this

issue of race. I am raising this to say to you: as defense attorneys, you carry the mantle of part of what has to be done in the system to maintain a democracy. As people whose decisions impact the lives of individuals as well that of the Racial Justice Act, when you have a death penalty case in front of you, take very serious note of and learn or create or find avenues by which you can utilize that Act as a tool to deal with racial discrimination. Death is the ultimate. I assume there are varying opinions in the room about the death penalty. Notwithstanding what you believe, it's something that should be pursued. I encourage you to pursue it.

Racial profiling. In the Racial Justice Act, I came up against the prosecutors. The prosecutors fought it in a really irrational way. Some of them even took positions that I would say were less than commendable in terms of fighting issues on the level that Representative Crenshaw and myself fight these issues. In other words, they were not honest in their approach in dealing with these things and were trying, in some instances, to undermine it at all costs. On racial profiling, I ran up against some of the same individuals. Not from prosecutorial standpoint, which I thought was odd, but from the police department standpoint across Kentucky. The knee-jerk reaction was there was no racial profiling. Two years ago when these issues were raised, their position was "we don't racial profile." But, as the facts began to unfold in New Jersey, Florida and several of the other jurisdictions and as top officials began to say to people, "Yes, racial profiling exists, and in fact, we use it as a policy as you have defined it." Then, it gained more credibility in terms of dealing with these issues. Even though it had gained a credibility, and even though everyone understood it was something that should not take place, I still got the same kind of resistance from not only prosecutors, not only from police departments, but also from legislators.

The Kentucky Racial Profiling Act did not pass when I first put it out there. Legislative leaders blocked it. So, I went to the Governor. The Governor embraced it. The Governor instituted his Executive Order on Racial Profiling. When he did his Executive Order, basically affecting state agencies, a number of local agencies were invited and did come forward and did participate voluntarily. But, that left out over 360 local police agencies. It was a good beginning. We came back with another bill that actually impacted whether or not an agency could receive Kentucky Law Enforcement Program Funds depending on whether they adopted these policies on racial profiling.

There was some discussion early about the statistical and the monitoring aspects. The value of monitoring the statistics is really an administrative aspect, a tool for the administration of the police department. It does change behavior. If I have learned anything in life, I have learned that you cannot change hearts but you surely can change behavior. Because people's livelihoods are tied to some of the things that you say are outside the realm of acceptability. And, there are consequences, therefore.

To have an effective racial profiling effort there has to be a clear policy prohibiting racial profiling. There has to be training that supports that policy. Training provides an understanding of what the mechanics of racial profiling are and why it is bad for us as a system. We have to have the monitoring because it is the instrument that is used administratively to let a person know that they may be caught if they do violate those clear policies. And, there have to be consequences if the policy is violated.

What I try to do is get law enforcement to understand that it is to their benefit to lead on prohibiting racial profiling. If you look at the Gallop polls of 1998 and many polls afterward, most people believe that there is racial profiling, most believe that it is wrong, and most believe that it should be prohibited. If that is a reality or if that is a perception, what that means is at least some part of the community that the police protect and serve do not have the trust that the police are going to carry out things necessarily to their benefit in some situations. That undermines effective police work. When race is a factor or is perceived as a factor that undermines the system of justice itself and it also undermines the democracy as a whole. ■

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"The great enemy of truth is very often not the lie, — deliberate, contrived, and dishonest, — but the myth—persistent, persuasive, and unrealistic."

JOHN FITZGERALD KENNEDY

The Faces and Myths behind Racial, Ethnic, and Religious Profiling

It was the kind of story that leaves you speechless, because it says everything.

In a room of her peers, during a discussion on racial profiling I had been asked to lead, LaTonya (not her real name), an African American high school student from Louisville, recounted what happened on a recent journey she and her father took for what was supposed to be a happy occasion. It was one of those memorable days, she recalled, filled with quality time between daughter and father. LaTonya, who is gifted academically, and her father were traveling I-64 to visit a university that was offering her a scholarship because of her talents. The future seemed as bright and far-reaching as the spring sun.

Along the way, an accident forced all vehicles to detour off the expressway through a small town — a temporary and hopefully short delay to their destination. But as the two drove through town, a police car with flashing lights pulled up behind them and motioned them to pull over. After the father showed his operator's license and car registration, he asked the officer why he had been stopped. The officer replied, "You looked lost. You're not from here, are you?" The father explained the purpose of their journey and that they were forced to pass through town. The officer seemed satisfied with the response and told them they could leave. And they did.

LaTonya described her emotions of shame and intimidation and fear and anger. Her happy day had suddenly turned sour. As she and her father completed their journey, she decided she would not let that moment divert her and instead used it to motivate her. Now LaTonya intends to become a lawyer.

LaTonya was lucky: she wasn't harmed physically nor did she let the experience undermine her self-esteem. Not all victims of profiling are so fortunate. Nor is LaTonya's story of profiling unique. Here are some other examples:

- While strolling down a city street in Owensboro, Kenny Riley, an off-duty and out-of-uniform African American Daviess County deputy sheriff, was approached and screamed at by a white Owensboro Police officer after the deputy waved to the officer. When the deputy showed his badge, the officer sped away without comment. Deputy Sheriff Riley believed the incident might be racially motivated and filed a complaint that resulted in discipline for the police officer. "I wanted to make sure this was brought to light so that it doesn't happen to anyone else," he said.
- A Northern Kentucky couple of African descent was traveling the expressway when a police officer pulled them over. When Victor (not his real name), the driver, asked the reason for the stop, the officer said Victor had not signaled when he changed lanes. Victor replied he believed he had. The officer then asked, "Is this your car?" Victor replied affirmatively, knowing that the officer probably wondered how an African American couple could own a relatively new Volvo. "Do you have a job?" the officer asked next. A well-respected career professional, Victor replied, "Of course I have a job, as does my wife. How else do you think we could afford this car?"
- Last July, Sergeant Lopez High, an African American Louisville Police officer, was approached by two Caucasian Jefferson County Police officers as he was having his broken-down car towed. Noticing that the vehicle registration had expired (and not knowing the off-duty and out-of-uniform Sergeant High was an officer), the two officers asked Sergeant Lopez to produce a current registration decal, and he did. When they insisted he put the decal on the vehicle right away, he replied that he would do so when the tow truck reached its destination. During the ensuing conversation, one of the County officers called the Sergeant "boy." When one of the officers asked what he did for a living, Sergeant Lopez replied, ''I do the same thing you do, except in a more professional manner.'' Sergeant Lopez, who said he felt like he was being treated like a drug courier, has filed a federal lawsuit claiming racial profiling.
- In late 2000, a Lexington-Fayette police officer turned on his flashing lights and stopped three African American young men as they drove early one morning through a mostly white suburb of southwest Lexington searching unsuccessfully for a friend's home. The officer questioned the teenagers for 45 minutes, asking for their names, ages, addresses, Social Security numbers, parents' names, and more. He asked them why they were in the neighborhood. Three additional patrol cars soon surrounded the scene. The officer never accused them of breaking any traffic law. He let them leave. The father of one teenager has filed suit against Lexington-Fayette police.
- The September 11 terror attacks have resulted in additional forms of profiling. In the week of September 11, several Louisville business owners of Middle Eastern descent called the ACLU of Kentucky to report that a Louisville Police officer had come to their places of business and asked a series of questions including their national origin, Social Security numbers, and length of their citizenship, and asked to see and write down information from their drivers licenses. The Police Chief's office assured the ACLU of Kentucky that our information was

incorrect. We then contacted the Mayor's office and ultimately spoke with Deputy Mayor Milton Dohoney, who acknowledged that police officers were indeed visiting business owned by people of Middle Eastern descent, for the purpose of assuring them of their safety. We reminded him that protecting people's safety doesn't require asking for very personal and irrelevant information.

Though the ACLU of Kentucky has not yet filed suit over a profiling incident, the ACLU has filed more than a dozen cases around the country. Three noteworthy cases are worth mentioning here:

- Police stopped Master Sergeant Rossano Gerald and his 12-year-old son Gregory twice within a 20-minute period after they crossed into Arkansas on their way from Maryland to Oklahoma for a family reunion. In the second stop, three state troopers held the Geralds, who are African American, for more than two hours in 90-degree heat, during which the officers dissembled much of the family car, doing more than $1,000 in damage. At one point, the police separated the father and child, leaving Gregory alone in a patrol car with a snarling, barking drug-sniffing dog.
- Police stopped Robert Wilkins, an African American, Washington, DC-based criminal defense attorney and his family as they traveled home from a family funeral. They were ordered out of their car and detained in the rain for 45 minutes while the police called for a drug-sniffing dog, although Mr. Wilkins had refused to consent to a police search of the family vehicle. Recounting the incident, Mr. Wilkins said, "The police lights were flashing while cars passed. People were slowing down to watch, with their faces pressed against the window. We were just standing there, looking stupid and feeling humiliated – and we hadn't done anything wrong."
- In mid-January, the ACLU of Illinois filed suit on behalf of Samar Kaukab, a Muslim-American woman who was strip-searched at O'Hare Airport. Ms. Kaukab passed through metal detectors without setting them off, and there was no indication that she was carrying any banned materials on her person or in her carry-on bags. Yet security officials ran a handheld wand around her body, passing several times over her hajib, a head wrap covering her hair and neck in accordance with her religion. Still, no alarms sounded. A male security official nonetheless insisted that she remove her head covering, and she explained that she could not do so in the presence of men. She was eventually brought to a private room, where a female employee conducted not just a search of Ms. Kaubab's hajib but a full, invasive body search that one would expect at a doctor's office. The search produced nothing.

Racial profiling is old news to African Americans and many other racial, ethnic, and religious minorities. And that is perhaps the biggest tragedy of all: people have come to expect such treatment by law enforcement officials who are sworn to protect and serve. Whether or not an incident of profiling results in injury or trumped-up charges, victims consistently report humiliation and a feeling that they are being "put in their place."

Profiling happens when the police, FBI, Immigration and Naturalization Service, or other law enforcement stop, question, search, or investigate a person because of race, ethnicity, national origin, religion, gender, sexual orientation, or other characteristic.

In most profiling, law enforcement officers use skin color as a proxy for suspicion, based on stereotypes that minorities are more likely to be doing something illegal.

The ACLU opposes profiling because it is morally wrong and it is illegal. Profiling is an unconstitutional violation of the Fourteenth Amendment, which requires equal protection of all citizens, regardless of race, national origin, and other factors; the Fourth Amendment, which requires government to have probable cause or at least individualized suspicion to stop and search a person; Title VI of the Civil Rights Act of 1964 and it implementing regulations, which prohibit discrimination by recipients of federal funding; and other federal and state laws.

In addition to being immoral and illegal, profiling simply doesn't work: it is inefficient and ineffective policing. Numerous studies have demonstrated that the stereotypes forming the basis of profiling are unfounded.

While anecdotes are helpful in putting a human face on the problem of profiling, they hardly in and of themselves prove that law enforcement officials and agencies profile. However, national and Kentucky-specific data complete a very clear picture:

- A study of police stops along segments of the New Jersey Turnpike in 1988-1991 found that almost all drivers (98%) were speeding and therefore presumably at equal risk for being stopped. But while 14% of vehicles had an African American driver or passenger (comprising 15% of speeders), 35% of all those stopped – and 44% of those stopped in one segment — were African American. Further, every New Jersey State Police officer who testified during the ensuing litigation said there is absolutely no difference in driving behavior between racial and ethnic groups.
- A study conducted in 1997 on a stretch of Interstate 95 in Maryland found that almost all drivers (92%) were violating the speeding law. But while 17% of the vehicles had an African American driver (and 18% of speeders were African American), 73% of those stopped and searched by the Maryland State Police were African American. Drivers who were Hispanic/Latino and of other ethnicities accounted for 7% of speeders and 8%

Continued on page 12

Continued from page 11

of those stopped and searched. Caucasians were less than 20% of those stopped and searched though they comprised 74% of all speeders. A Maryland State Police internal memo discovered during litigation said, "dealers and couriers are predominately black males and black females." The ACLU filed suit on behalf of the NAACP of Maryland and 18 individual plaintiffs, resulting in an agreement that the state police would collect data on all stops. Yet in 2000, data showed that 63% of motorists stopped and searched by Maryland state troopers were racial and ethnic minorities (50% African American, 10% Hispanic/Latino, and 3% other minority).

- Profiling is not limited to the nation's roadways. A study by the U.S. General Accounting Office, a congressional research agency, found that African American women returning from international flights in 1997 and 1998 were selected in disproportionate numbers by Customs officials for personal searches that included x-rays and strip searches.

Data collected in Kentucky so far is consistent with data from other parts of the country:

- In early 2000, Louisville Mayor David L. Armstrong said in a *New York Times* story that some Louisville police officers treat African Americans and Caucasians differently, but then fell silent as racial tensions mounted in that city. His observation was confirmed by two Louisville *Courier-Journal* studies conducted later that year showing a strong likelihood that African American motorists are 2-3 times more likely than Caucasian motorists to be stopped by Louisville police officers. In the most compelling of the two studies, while 7.6% of drivers traveling one street were observed to be African American, 22% of those stopped by the police were African American. Louisville Police Chief Greg Smith and a University of Louisville Justice Administration professor attacked the studies' methodology. However, four national experts disagreed with them, saying the studies indicate there is a problem.
- Lexington-Fayette Urban County Police began collecting data on race and gender for all traffic stops after a *Herald-Leader* study found that black men received a disproportionate number of traffic tickets from 1995 to 1998. In 1999, though Lexington-Fayette police issued traffic <u>citations</u> in equal proportions based on race and gender, traffic <u>warnings</u> went to a disproportionate number of African American women and men. The ratio of police warnings was 45% higher for African American women compared to Caucasian women, and 61% higher for African American men compared to Caucasian men. Then-Police Chief Larry Walsh acknowledged publicly that he was pleased with the citation data but disappointed by the warning data. Another *Herald-Leader* study found that while 13% of the local population is African American, 36% of searches of motorists and pedestrians by Lexington-Fayette police from February through November 2000 were of African Americans.

In addition to considering litigation, the ACLU of Kentucky has worked through public education and legislative advocacy to stop and prevent profiling. These efforts are a natural continuation of our racial justice work since the founding of our state organization in 1955, including our work to end school segregation, pass the Racial Justice Act to end racial bias in the death penalty, and establish civilian oversight of the Louisville Police Department. Our pocket-sized "bust cards" (in English and Spanish) explain what to do if stopped by the police and are available free to the public. Our recently produced "Know Your Rights" pamphlets explain what to do if stopped by the police, the FBI, the INS, and other law enforcement agents. Also available free of charge, the pamphlets are available in English, Spanish, Arabic, Farsi, Hindi, Punjabi, and Urdu. In March, we held public forums about profiling in Covington, Lexington, and Louisville, with 20 cosponsoring organizations.

The ACLU of Kentucky is also proud of spearheading community-based efforts to pass the Racial Profiling Act of 2001 (described in Leonardo Castro's article in this journal), working closely with sponsor Senator Gerald Neal (D-Louisville). With that law's passage, Kentucky became the sixteenth state to pass legislation to stop and prevent profiling. The Racial Profiling Act of 2001 essentially codified an April 21, 2000 Executive Order issued by Governor Paul E. Patton

Though we have much more to do, other progress has occurred in Kentucky:

- To build on his Executive Order, in the fall of 2000 Governor Patton announced a data collection study in which 25 local law enforcement agencies agreed to collect information on the race, ethnicity, and gender of every person they stop. A preliminary report from the study has yet to be released by the Justice Cabinet but was expected in March 2002 and is to be released annually.
- Some local law enforcement agencies have voluntarily passed policies and data collection plans on their own. Each policy is unique. While most include essential provisions, some do not include pedestrian stops, and some don't even allow for a way to identify officers who might be engaging in profiling.

Because profiling is based on stereotypes, the work to eliminate profiling practices must include challenging and dismantling false assumptions upon which stereotypes rest. An examination of these assumptions makes clear that racial profiling is simply bad policing. It is ineffective and a waste of precious resources. Consider the following mythical assumptions:

- <u>Mythical assumption #1: It is "rational discrimination" for police to stop disproportionate numbers of minorities, who are more likely to be found breaking the law.</u>

Data from multiple sources show that police stops result in no significant difference in hit rates – percentages of searches that find evidence of law breaking – for racial and ethnic minorities and Caucasians. Police don't find drugs or other contraband on the racial and ethnic minorities they stop more often than on the Caucasians they stop.

- In the previously cited study along Maryland's I-95 corridor, though state police stopped African Americans disproportionately, the percentage of searched vehicles in which the police found contraband was the same for Caucasians and African Americans.
- In New Jersey, where state police have admitted to racial profiling, the hit rates for contraband were 25% for Caucasians, 13% for African Americans, and 5% for Hispanics/Latinos in consensual searches during 2000.
- In 175,000 pedestrian stops in New York City, African Americans were stopped six times more often than Caucasians. But the hit rates were 10.5% for African Americans and 12.6% for Caucasians.
- 1998 Customs searches for illegal materials at airports revealed hit rates of 6.7% for Caucasians, 6.3% for African Americans, and 2.8% for Hispanics/Latinos. In 2000, after changing its policies to eliminate race and gender bias, Customs conducted 61% fewer searches but experienced an increase in drug seizures. Hit rates increased for all racial and ethnic groups, because the focus was on suspicion rather than race, ethnicity, and gender.

- Mythical assumption #2: Profiling makes sense because minorities are more likely to be drug users and traffickers. Though many have tied police drug interdiction training to the practice of profiling, scientific evidence does not support the stereotype that racial minorities disproportionately use and traffic in drugs:
  - An anonymous national survey by the U.S. Public Health Service found that African Americans are 15% of illegal drug users (and 13% of the nation's population); Caucasians are 70% of the U.S. population and 70% of illegal drug users; and Hispanics/Latinos are 11% of the population and 8% of illegal drug users. Yet nationally African Americans are 35% of those arrested for drug possession, 55% of those convicted of drug possession, and 74% of those imprisoned for drug possession.
  - A National Institute of Justice study found that most users say they get their drugs from people of their own race or ethnicity, meaning that the race of dealers tracks the race of users.

- Mythical assumption #3: Victims share at least some of the blame for profiling. At the beginning of a March racial profiling public forum in Lexington sponsored by the ACLU of Kentucky, when the presenter asked if anyone of the approximately 50 people in the room had ever been profiled, a Lexington-Fayette police officer shot up his arm and said, "I have. Every time I patrol in a black neighborhood, I'm profiled as a white police officer." When a college student, a young African American woman, told her story of being stopped numerous times while driving her boyfriend's SUV from Frankfort to Lexington, several of the five Lexington-Fayette police officers attending the forum attempted to shift blame. First, they tried to suggest that she was being untruthful. Then one officer (an African American man) said she should have reported the incidents sooner – that in essence what happened to her after the first stop was her own fault. It was a classic example of blaming the victim. She then asked, "Why would I come to the perpetrators to ask for help — especially when it's clear you wouldn't believe me anyway?"

- Mythical assumption #4: All law enforcement agents support profiling. The purpose of policies and laws to stop and prevent racial profiling is to identify those officers who engage in profiling. All officers don't profile, and those who don't should be interested in identifying those who do. Data collection is simply a good management tool, which is why in many states organizations such as associations of chiefs of police support racial profiling legislation. It's about accountability to the community and good personnel management.

What can you do to help stop and prevent profiling? Here are a few suggestions:

- Report and urge citizens to report profiling incidents to the ACLU of Kentucky at 502-581-1181 or acluky@iglou.com or by calling the ACLU's national toll-free racial profiling hotline at 1-877-6-PROFILE.
- Partner with the ACLU of Kentucky by consulting about profiling complaints and even working with us on litigation.
- Increase accountability by helping the ACLU of Kentucky pass state legislation requiring local law enforcement agencies to collect data on all stops, and local laws providing civilian oversight of law enforcement agencies.
- Inform citizens of their rights. Request copies of the ACLU "bust card" and "Know Your Rights" brochures to give to your clients, friends, co-workers, and family-members. ■

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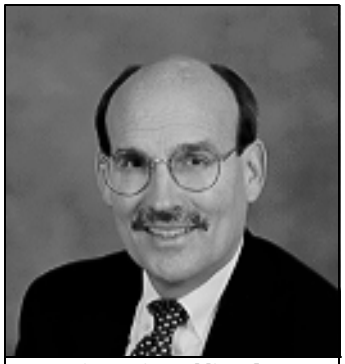
The Influence of Race and the Defense Lawyer's Responsibilities



Ernie Lewis, Public Advocate

Last year I served on a panel at the Department of Public Advocacy's 29th Annual Conference on race and the criminal justice system. The following is an edited version of my comments at that panel.

Steve Bright has said the following, and I agree completely with him: "Racial bias influences every aspect of the criminal justice system. African-Americans, Latinos and members of other racial minorities are more likely than similarly situated white people to be stopped by the police, to be arrested after being stopped, put in choke holds by arresting officers, denied bail, denied probation and given harsher sentences including the death penalty." I believe that from the moment the officer sets out at night and decides what neighborhood he or she is going to drive into through the decisions made regarding what kind of stop he is going to make, through who gets out on bail, through who gets probation and who gets treatment, who gets the good deal and who gets the take it or leave it deal, who gets the death penalty notice and who doesn't, I absolutely believe that race is at the core of those decisions.

If Steve Bright is right on that, then we as public defenders have an absolute obligation at every one of those flash points, from the moment of arrest until the end of that case to raise race as an issue and to litigate it fully. If you don't believe what Steve and I are saying, or if you need some background on some statistics to show that is true, Mark Mauer of The Sentencing Project has written a book *Race to Incarcerate* (1999) which gives careful and substantial support to the manner in which race is inherent in each of those stages. I would encourage all public defenders and other criminal defense practitioners to get that book and to interpret and translate what's in there for your judges, your prosecutors, your police and for each other.

We raise race really in two ways, 1) in litigation, and 2) as managers, directing attorneys and participants in the criminal justice process. What we are really trying to do by litigating in every one of these instances with our clients and by being co-managers of the system is to change Kentucky from what was the reality in 1954 toward the vision that Senator Neal and Representative Crenshaw have for our society. That's really what we're doing, we're about changing Kentucky. Of course you are representing your individual clients. But, when you represent your individual clients you are also changing Kentucky for the better.

Let me give you a couple of brief examples. Back when I began my 14 years practicing in the trial arena in the Richmond office, one of the things that I would do from time to time was particularly, mostly in serious cases, murder cases, was to attack the jury commissioner's system that we had in place then. Most of you are young enough not to member that system. In the not too distant past, our circuit judge would appoint 5 jury commissioners, most of them appearing to be Presbyterians in Richmond, and the jury that resulted looked like a pot-luck supper in the Presbyterian church. Now, try to try a case consisting of 12 Presbyterians. It's not pretty. (By the way, I have been Presbyterian for the last 25 years). So I, from time to time, would raise that issue statistically. Once I began trying the case, when I would go out after choosing a jury, or to go out to choose a jury after voir dire, this particular judge would tell the panel how certain people were raising this issue. Those of you who remember this particular judge after he exhausted talking about all the people on the walls in the courtroom would then go in to describing how some lawyers in Kentucky were try to challenge the fairness of the process. Then I'd walk back in and try to try a case in front of the jurors who had just heard the judge's diatribe.

Raising that issue, and Gail Robinson's raising it and Kevin McNally's raising it and people all over Kentucky raising that, including civil practitioners resulted in a change. The Kentucky Supreme Court was receptive to the issue, and changed the rules so that what you now have is the ability to try a case before a true cross section of the community. Juries now look more like you're trying it at Wal-Mart than at the Presbyterian Church, because you're getting a computer selected cross section using driver's license and voter's registration. I use that as an example because that's a way you can go at the race issue, litigating it one case at a time, and ultimately changing a system.

I have a second example. I tried a capital case toward the end of my time in the Richmond Office. Three migrant workers from Taumelipas, Mexico, were charged with having murdered 2 white men in Clark County. Clark County had experienced a lot of organizing by growers and other white folks against migrants in Winchester and in Clark County. As we neared the time of our trial, we received an offer from the prosecution of life without parole for 25 years. That's what the prosecutor thought that they could get if they tried the case. We had made a motion for a change of venue and it used statistical analysis to show the attitudes towards specifically Mexican migrant workers in Clark County at that time. A very wise circuit judge delayed ruling on that until the day before the trial was to start. On Friday afternoon, he called us all together, while the offer of life w/o parole for 25

years was still on the table, and that wise circuit judge said I'm changing the venue from Winchester over to Richmond. Ultimately, two of our clients got 4 years on reckless homicide, and one of our clients got 8 years on second degree manslaughter, in a fair venue that didn't feature biased attitudes. These are two ways of litigating on the issue of race that ultimately changed something significant.

Let me say one or two other things about areas in which you should be litigating. I want to reiterate briefly what Lenny Castro talked to us about with the Racial Justice Act and the Racial Profiling Act. I talked to Senator Neal about whether the Racial Profiling Act has an exclusionary rule in it. There is nothing in the Racial Profiling Act regarding an exclusionary rule. I submit that if an officer has racially profiled then we ought to be moving to exclude the evidence that comes out of that illegal act in violation of the law. The exclusionary rule generally is used to change police behavior. It makes perfect sense to create a state exclusionary rule to enforce the Racial Profiling Act.

The United States Supreme Court says pretext is not relevant in search and seizure cases. If you look at all of them, particularly *Whren vs. Commonwealth*, *Illinois vs. Wardlow*, and *Atwater v. Lago Vista*, you can see how race can be used by the officer in a discriminatory way. The Racial Profiling Act and the Racial Justice Act mean that pretext is back in Kentucky as a means for challenging a prosecution and challenging an illegal search. If there is pretext, it seems to me, that's a violation of the Racial Profiling Act. If the officer is going at this particular stop in a pretexual fashion, in Kentucky *Whren* is out the window and we ought to be encouraging exclusion of the evidence seized as a result of the stop conducted in violation of the Racial Profiling Act.

The last point I want to make is to support Lenny's other point, which is that we've got to change ourselves. We have got to have the courage to litigate. When you raise the race issue with that particular judge, you may not be viewed in a particularly favorable light by either that judge or other members of the Bar. But that must not be your focus. You've got to do raise it anyway, you've got to have the courage to raise race in death penalty cases, you've got to raise race where there is a pretexual stop or arrest, you've got to raise it at preliminary hearings, and any other appropriate place. We have got to start raising these issues if we're going to keep moving Kentucky from 1954 into the future. ■

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Litigate Issues of Racial Discrimination

Gail Robinson

Gail Robinson participated in a panel on race issues at the June, 2001 DPA Annual Conference. This article is a summary of her remarks at that time.

I am certainly not an expert on litigating race issues. However, when I look back on my more than 20 years of practice and think about the topic, I realize that I have raised and litigated issues regarding race as have many criminal defense attorneys sensitive to what is happening around them in the court system. It's my belief that we owe it to our clients to raise these issues when they are present in their cases no matter how uncomfortable they make us or others in the courtroom. I'll offer examples of a few issues I have raised or litigated and what was accomplished for the client, case or the court system in general. I believe it's important that defenders not close their eyes to racial issues.

My first example comes from my early years of practice when I represented a black man charged with serious offenses, including murder and rape, against three white women. The judge stated that we needed to ask in group voir dire about whether anyone had a racial prejudice which might affect their impartiality and, if anyone indicated they might, we could follow-up during the individual voir dire which was to be conducted solely on death penalty issues. I was frankly very nervous about the prospect of asking jurors, particularly in group voir dire, about racial bias. I tried to be tactful and disclosed my own biases, approaching the subject in terms of certain jurors not belonging on certain cases. When I broached the topic of whether any potential jurors thought that they might not be suitable for our particular case because of racial experiences or prejudgements, I was amazed when quite a few hands shot up. Even though I had advised, as had the judge, that an individual simply had to raise his or her hand and we would talk with that person more about the subject in individual voir dire, a number of venirermen volunteered their racial prejudice right then in open court and were excused. We managed to excuse several jurors both in group and individual voir dire because of admitted racial bias, which was certainly beneficial to our client. In every case since then, I have explored racial issues, if they exist, during voir dire and have almost always been successful in having at least one juror excused for cause because of bias. The exploration of racial issues during voir dire is a fundamental requirement for a competent defense attorney.

Continued on page 16

Continued from page 15

Another example arose when I was the conflict public defender while in private practice. A conflict was discovered right before court and I agreed to represent at arraignment a young man who was in jail and charged with unlawful transaction with a minor. Consistent with the practice in that court, I went to talk with the complaining witness to determine what resolution of the case might be possible. I'd reviewed the petition and noted that my client, who was 19, was charged with illegal sexual activity with a minor. Roaming the hallway, I found a very angry father and a rather sophisticated looking girl. The father stated that "that nigger needs to go to jail for having sex with my daughter." The daughter, who was 17, appeared to want nothing to do with this entire matter. The complaining witness was the father, and he and his daughter were white.

I got the opportunity to meet my client when they brought him over from the jail. My client was a young black man and I advised him that I did not think that there was a crime here since the girl was over the age of consent (16 years of age) and thus I did not believe this could be "illegal sexual activity." I spoke with the County Attorney, explained my position and asked that he request that the charge be dismissed. He stated that he would have no objection to the client being released and sentenced to time served if he would plead guilty but that he would not agree to dismissal of the charge because the father was so angry and "illegal sexual activity" was not defined in the statute. My client's major interest was getting out of jail as soon as possible. Thus, after I advised the court that I opposed that course of action, he entered a guilty plea.

I explained to the court that I was objecting to entry of the guilty plea because I believed that my client had not committed a crime or been charged with a crime and that, in fact, the only reason he was charged was because he was a black man who had had sex with a white girl. The atmosphere in the courtroom was very tense as I talked about this, but the client was appreciative that I had spoken the truth on his behalf.

The third example is a client who was acquitted in federal court of carjacking and then charged in state court with murder. The client was a black man and the victims were white. It was extraordinary for anyone to face a prosecution in state court for the same transaction for which they'd been tried in federal court. A question arose about why this particular client was being picked out. We decided to move to dismiss the prosecution as vindictive and selective and request an evidentiary hearing.

The prosecutor was absolutely outraged at what he saw as an accusation of racism against him. The judge decided that there was no evidence to support our claim and refused to grant a hearing. Of course, there was no "evidence" because it is unlikely that an individual in the position to prosecute for the Commonwealth would state that they were prosecuting a person because of their race but the absence of other successive prosecutions when the possibility had existed but the defendants were white certainly set off alarm bells for us. We didn't even get a hearing on our motion but we hope it served as a deterrent for future successive prosecutions.

In conclusion, we must litigate racial issues if they are present in our clients' cases no matter uncomfortable they make us and others in courtroom because we owe it to our clients as their advocates.■

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Lexington Police Chief on Profiling

(*Lexington Herald Leader*, February 22, 2001) Beatty says profiling banned: Lexington Police Chief Anthany Beatty said yesterday that the police department is continuing to enforce a policy that bans the targeting of individuals by race. Beatty, who was speaking on a panel at the University of Kentucky, said the police department continues to track citations and arrests made by officers, watching to see whether blacks or other minorities are being targeted. "I, as an African-American, fully understand the problem," he said. Beatty said that as a youth he watched Lexington officers discriminate against blacks. But he noted the department had responded to the accusations of racial enforcement made three years ago by adopting a policy banning profiling. "Whether it was real or perceived, it was an issue," he said. After the session he said there had been no complaints of profiling made against any officers since he took office in August.

KRS 15A.195

15A.195 Prohibition against racial profiling — Model policy — Local law enforcement agencies' policies.

(1) No state law enforcement agency or official shall stop, detain, or search any person when such action is solely motivated by consideration of race, color, or ethnicity, and the action would constitute a violation of the civil rights of the person.

(2) The secretary of the Justice Cabinet, in consultation with the Kentucky Law Enforcement Council, the Attorney General, the Office of Criminal Justice Training, the secretary of the Transportation Cabinet, the Kentucky State Police, the secretary of the Natural Resources and Environmental Protection Cabinet, and the secretary of the Public Protection and Regulation Cabinet, shall design and implement a model policy to prohibit racial profiling by state law enforcement agencies and officials.

(3) The Kentucky Law Enforcement Council shall disseminate the established model policy against racial profiling to all sheriffs and local law enforcement officials, including local police departments, city councils, and fiscal courts. All local law enforcement agencies and sheriffs' departments are urged to implement a written policy against racial profiling or adopt the model policy against racial profiling as established by the secretary of the Justice Cabinet within one hundred eighty (180) days of dissemination of the model policy. A copy of any implemented or adopted policy against racial profiling shall be filed with the Kentucky Law Enforcement Council and the Kentucky Law Enforcement Foundation Program Fund.

(4) (a) Each local law enforcement agency that participates in the Kentucky Law Enforcement Foundation Program fund under KRS 15.420 in the Commonwealth shall implement a policy, banning the practice of racial profiling, that meets or exceeds the requirements of the model policy disseminated under subsection (3) of this section. The local law enforcement agency's policy shall be submitted by the local law enforcement agency to the secretary of the Justice Cabinet within one hundred eighty (180) days of dissemination of the model policy by the Kentucky Law Enforcement Council under subsection (3) of this section. If the local law enforcement agency fails to submit its policy within one hundred eighty (180) days of dissemination of the model policy, or the secretary rejects a policy submitted within the one hundred and eighty (180) days, that agency shall not receive Kentucky Law Enforcement Foundation Program funding until the secretary approves a policy submitted by the agency. (b) If the secretary of the Justice Cabinet approves a local law enforcement agency's policy, the agency shall not change its policy without obtaining approval of the new policy from the secretary of the Justice Cabinet. If the agency changes its policy without obtaining the secretary's approval, the agency shall not receive Kentucky Law Enforcement Foundation Program funding until the secretary approves a policy submitted by the agency.

(5) Each local law enforcement agency shall adopt an administrative action for officers found not in compliance with the agency's policy. The administrative action shall be in accordance with other penalties enforced by the agency's administration for similar officer misconduct.

Effective: June 21, 2001

History: Created 2001 Ky. Acts ch. 158, sec. 1, effective June 21, 2001.■

MODEL KY RACIAL PROFILING POLICY

Pursuant to KRS 15A.195

POLICY

The protection of, and the preservation of the constitutional and civil rights of individuals remains one of the paramount concerns of government, and law enforcement in particular. To safeguard these rights, law enforcement personnel shall not engage in any behavior or activity that constitutes racial profiling. The decision of an officer to make a stop or detain an individual, or conduct a search, shall not be solely motivated by consideration of race, color, or ethnicity. Stops, detentions, or searches shall be based on articulable reasonable suspicions, observed violations of law or probable cause, and shall comply with accepted constitutional and legal provisions, and with the Code and Cannon of Ethics adopted by the Kentucky Law Enforcement Council through Peace Officer Professional Standards.

Definitions

For purposes of this policy:

"Racial Profiling" means a process that motivates the initiation of a stop, detention, or search which is solely motivated by consideration of an individual's actual or perceived race, color, or ethnicity, or making discretionary decisions during the execution of law enforcement duties based on the above stated considerations. Nothing shall preclude an officer from relying on an individual's actual or perceived race, color, or ethnicity as an element in the identification of a suspect or in the investigation of a crime, a possible crime or violation of law or statute.

Training

All officers shall complete the Kentucky Law Enforcement council approved training related to racial profiling. Such training shall comply with Federal Law, state statutory provisions, case law and other applicable laws, regulations, and established rules.

Discipline

An officer who violates a provision of this policy shall be subject to the agency's disciplinary procedures, which shall be consistent with other penalties imposed for similar officer misconduct.■

First Annual Hate Crimes Report Completed and Released by the Kentucky Criminal Justice Council

FRANKFORT, KY – The report "Hate Crime and Hate Incidents in the Commonwealth of Kentucky" recently was completed and released by the Kentucky Criminal Justice Council. This report includes official federal data reported in the Uniform Crime Reports and state level data reported to the Kentucky State Police. It also incorporates anecdotal information compiled from select newspapers; reports received by the Kentucky Commission on Human Rights; information provided by the Kentucky Fairness Alliance; and data collected by the Anti-Defamation League. The full report can be accessed on the web at www.kcjc.state.ky.us; click on the "Publications" button.

"Crimes committed because of the race, color, religion, sexual orientation, or national origins of the victims are intolerable," said Governor Paul Patton. "I have supported legislation enhancing penalties for hate crimes in the past and will continue to do so in the future."

"The goal of the Hate Crimes Statistics Work Group was to provide a comprehensive picture of hate crime in Kentucky," stated Beverly Watts, executive director of the Kentucky Commission on Human Rights and chair of the Hate Crime Statistics Work Group. "It is anticipated that this report will serve to inform both the public and state policy as it relates to the incidence and prevalence of bias-motivated crime."

The report highlights the following state and national trends in hate crime:

- National reports suggest that in 2000, 54.5% of all hate-bias offenses were racially motivated. Almost one-third of all hate crime incidents in the United States occurred at a home or residence (32.1%). Over two-thirds of all hate incidents in the United States in 2000 were for intimidation and destruction, damage, or vandalism offenses (67.7%).
- In 2000, national reports indicate that, 17.2% of all hate-bias offenses were motivated by religion, while in Kentucky only 2.8% of all hate-bias offenses were motivated by religion. Underreporting of religious motivated hate-bias crime is one explanation given for the disparate data. However, anecdotal reports of religious motivated hate-bias offenses have increased since September 11, 2001.
- In 2000, according to the Kentucky State Police, 76.7% of all reported hate-bias offenses in Kentucky were racially motivated. In 2000, more than one-third of all bias-motivated crimes occurred at a residence or home (34.2%). Almost two-thirds (63%) of all hate-bias crimes reported in 2000 to the Kentucky State Police were for intimidation and destruction, damage, or vandalism offenses.

Hate Crimes Report Completed and Released:

- From January 2001 – September 2001, the most commonly reported bias motivation reported to the Kentucky State Police was racial. In 2001, more than one-third of all bias motivated crime occurred at a residence or home (36.5%). Almost half (49.2%) of all hate-bias crimes reported in 2001 to the Kentucky State Police were intimidation offenses.
- Anecdotal reports obtained from selected local newspapers, either through Internet searches or as identified by Hate Crime Statistics Work Group members, provide evidence of an additional 54 hate-related incidents from 1990 to 2001. While the identified incidents do not reflect an exhaustive survey of newspaper articles, they serve to augment official reports of hate crime in the commonwealth. It should also be noted that nine of the hate-related incidents were reported following the September 11, 2001 terrorist attacks. Reported hate-related incidents typically include harassment, vandalism, cross burnings, arson, and physical attacks.

Since its creation in 1998, the Kentucky Criminal Justice Council has established a neutral forum for discussion of systemic issues by a diverse group of state and local criminal justice professionals. As a statewide criminal justice coordinating body, the council works to develop a better understanding of the nature of crime across the different regions of the state; to develop clearer goals and system priorities; to promote coordination among the components of the justice system; and to promote effective utilization of limited resources. ■

Gratitude is one of the least articulate of the emotions, especially when it is deep.

-- Felix Frankfurter

Baltimore Officer Resigns Over Memo

Jaime Hernandez, Associated Press

BALTIMORE, March 6, 2002 (AP) - A police commander who wrote a memo telling officers to question all black men at a bus stop where a rape occurred has been forced to retire.

Maj. Donald Healy retired Tuesday after he was confronted by superiors about the Feb. 22 memo.

"Obviously, it's not only offensive to the African-American community, but it's illegal," Police Commissioner Edward Norris said.

Healy, a white, 29-year veteran, released a statement apologizing for causing offense but said the memo "had nothing to do with profiling."

"The memo was written hours after the attack occurred and it was meant to remind all of my officers to be thorough in their search for suspects who fit the description we had been given," Healy said. "Unfortunately, in my haste to catch a violent rapist, my directions were not specific enough."

Healy's memo told officers, "A female was raped last night ... Every black male around this bus stop is to be stopped until subject is apprehended." It also gave the suspect's approximate height and weight.

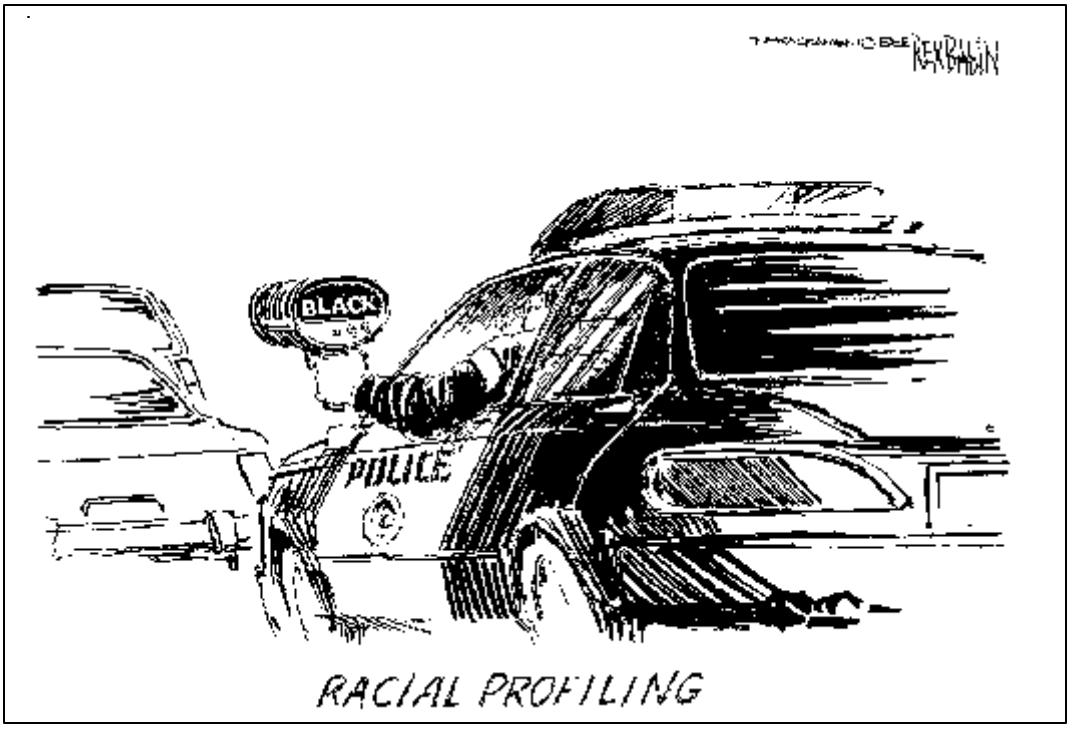
Police spokeswoman Ragina Averella said police have questioned three people in the area of the bus stop, but have not made any arrests.

About a dozen Baltimore lawmakers gathered Tuesday in Annapolis to express their outrage. State Sen. Nathaniel McFadden said he had talked with Norris and Mayor Martin O'Malley.

"It is outrageous, it's totally unacceptable," McFadden said. "It's racial profiling at its worst."

State Sen. Joan Conway, whose district includes the site of the rape, said police should have issued a more specific description, including at least an approximate age for the suspect.

"Those type of blanket statements should not be made as it relates to every black male," Conway said.



Reprinted with permission by Rex Babin, *The Sacramento Bee*

Racial Profile of Kentucky's Inmate Population

All Institutions: Kentucky Department of Corrections Profile of Inmate Population (January 2002)

Race	Number	Percent
White	9,557	64
Black	5,226	35
Native American	6	
Asian	9	
Hispanic	107	1
Other	18	
Total	14,923	100

Comparison of Profiles
Percentage of Institutional Population

	KSP	EKCC	GRCC	KCIW	KCPC	KSR	LLCC	NTC	RCC	WKCC	BCFC	BCC	FCDC	LAC	MAC	A&C	CD	CSC	CC	CI	CM
White	67	65	62	66	68	74	69	56	58	72	68	54	50	57	54	40	75	52	67	79	57
Black	21	33	37	33	27	26	30	42	40	28	31	46	50	41	46	59	24	47	33	19	43
Violent	66	58	58	40	68	47	40	56	36	36	53	34	37	45	41	35	16	13	8	21	57
Sex	9	14	14	4	14	27	35	10	4	37	0	--	0	8	0	9	--	--	--	9	8
Property	17	15	13	23	8	11	31	17	31	9	24	28	17	22	20	24	41	24	27	28	9
Weapon	1	1	1	1	0	1	1	1	1	1	2	1	1	3	2	2	2	1	2	1	2
Drug	6	10	13	29	11	13	10	14	25	16	20	35	43	22	34	25	29	59	61	37	24
Misc.	1	1	1	3	0	1	2	2	2	1	1	2	2	1	2	4	12	2	2	5	1
Median Sentence	20	15	16	9	20	15	15	14	9	12	10	10	10	10	10	7	4	10	6	5	10
Median Age	32	33	34	35	43	40	38	32	30	36	32	37	36	29	35	31	32	35	32	30	28

(-- less than 1%)

Above Abreviations:

Maximum Security

KSP: Kentucky State Penitentiary

Medium Security

EKCC: Eastern Ky Correctional Complex
GRCC: Green River Correctional Complex
KCIW: Ky Correctional Institute for Women
KCPC: Ky Correctional Psychiatric Center
KSR: Ky State Reformatory
LLCC: Luther Luckett Correctional Complex
NTC: Northpoint Training Center
RCC: Reederer Correctional Complex
WKCC: Western Ky Correctional Complex

Private Prisons

LAC: Medium Security: Lee Adjustment Center
MAC: Minimum Security: Marion Adjustment Center

Other

A&C: Assessment & Classification Center
CD: Class D Felon
CSC: Community Services Centers
CC: Community Custody
CI: Controlled Intake
CM: Contract Medium

RACE TO INCARCERATE: A CHALLENGE TO THE CRIMINAL JUSTICE SYSTEM

Rare does a book come along that is so good, so true, so prophetic, that it is a must read. *Race to Incarcerate*, by Marc Mauer, (1999 by The Sentencing Project), is that kind of book. It is well written, well documented, packed with information and data, and absolutely damning of all of us who work in this criminal justice system. It is a book everyone involved in the Kentucky criminal justice system, prosecutors, defense attorneys, corrections officials, juvenile workers, pretrial release offices, should get and read.

His basic premise is well known: We are in the middle of an enormous shift in the number of people we incarcerate in this country. "[A] complex set of social and political developments have produced a wave of building and filling prisons virtually unprecedented in human history. Beginning with a prison population of just under 200,000 in 1972, the number of inmates in U.S. prisons has increased by nearly one million, rising to almost 1.2 million by 1997. Along with the more than one half million inmates in local jails either awaiting trial or serving short sentences, a remarkable total of 1.7 million Americans are now behind bars." (p. 9). It should be noted that a more recent assessment places the figure at above 2 million. This enormous growth has consequences for our society. "First among these is the virtual institutionalization of a societal commitment to the use of a massive prison system." *Id*. The second consequence is insidious: much of this growth in the use of incarceration has occurred in the African-American community. Mauer asks several poignant questions: "What does it mean to a community…to know that three out of ten boys growing up will spend time in prison? What does it do to the fabric of the family and community to have such a substantial proportion of its young men enmeshed in the criminal justice system? What images and values are communicated to young people who see the prisoner as the most prominent or pervasive role model in the community? What is the effect on a community's political influence when one quarter of the black men in some states cannot vote as a result of a felony conviction?"

Why did this happen to us? Mauer agrees that a rising crime rate, including the rising violent crime rate, contributed to this prison growth. However, Mauer also uses the data to state persuasively that there has also been a significant political component to this growth as well, namely, the "victory" of the "get-tough-on-crime" movement. Examples of such policy development were the decline in the number of indeterminate-sentencing states, the growth of mandatory minimums, the abolition of parole, "truth-in-sentencing," 85% service prior to release for violent offenses, etc. "[R]esearch has demonstrated that changes in criminal justice policy, rather than changes in crime rates, have been the most significant contributors leading to the rise in state prison populations. A regression analysis of the rise in the number of inmates from 1980 to 1996 concluded that one half (51.4 percent) of the increase was explained by a greater likelihood of a prison sentence upon arrest, one third (36.6 percent) by an increase in time served in prison, and just one ninth (11.5 percent) by higher offense rates." (p. 34)

Mauer notes that we now spend approximately $40 billion each year to incarcerate persons convicted of crimes. Is there another way to maintain community safety while saving our precious public resources for other priorities, such as education or health? According to Mauer, incarcerating "ever-increasing numbers of nonviolent property and drug offenders is hardly the only option available to policymakers, nor is it necessarily the most cost-effective. A study of the California prison population funded by the California legislature concluded that as many as a quarter of incoming inmates to the prison system would be appropriate candidates for diversion to community-based programs. This group would include offenders sentenced to prison for technical violations of parole, minor drug use, or nonviolent property offenses. The study estimated that diverting such offenders would save 17-20 percent of the corrections operating budget for new prison admissions. Other commentators have suggested that even higher rates of diversion are possible." (p. 37).

Proponents of the "race to incarcerate" would contend that the recent decline in the crime rate demonstrates that the $40 billion spent each year is well worth it in the increase in public safety. However, Mauer contends that the growth of incarceration has not necessarily led to a decline in the crime rate. "Overall crime rates generally rose in the 1970s, then declined from 1980 to 1984, increased again from 1984 to 1991, and then declined through 1995. With only minor exceptions, violent crime rates have followed this pattern as well. Each of these phases, of course, occurred during a time when the prison population was continuously rising. Thus, a steadily increasing prison population has twice coincided with periods of increase in crime and twice with declines in crime. The fact that the relationships are inconsistent does not mean that rising imprisonment had *no* impact on crime, but neither does it lend itself to a statement that incarceration had an unambiguously positive impact in this area." (p. 83-84).

One of the points Mauer makes most strongly is that the problem of crime is complex, that we delude ourselves if we believe that people commit or do not commit crimes due to the possibility of being imprisoned, and that in fact the problem of crime is bigger than the criminal justice system. "Our reliance on the criminal justice system as our primarily crime

Continued on page 22

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control mechanism has blinded us to the complexity of crime and ways to control it, and has thus encouraged heightened expectations about the role of courts and prisons in providing public safety. Since by definition these institutions are reactive systems that come into play *after* a crime has been committed, it should hardly be surprising that their role in controlling crime will always be limited. While most of us recognize intuitively that families, communities, and other institutions necessarily play a major role in the socialization process, political demagoguery has promoted the centrality of the criminal justice system as the means by which communities can be made safer."

The title of the book is a double entendre. Mauer uses the title to describe the enormous growth in the prison population over the past 30 years. However, the title is also representative of a significant effect of this "race," and that is on race relations and on the communities of color in this nation. "At the close of the twentieth century, race, crime, and the criminal justice system are inextricably linked." (p. 118).

Mauer speaks persuasively through statistics. "Half of all prison inmates are now African American, and another 17 percent are Hispanic…" (p. 118-119). "[A] black boy born in 1991 stood a 29 percent chance of being imprisoned at some point in his life, compared to a 16 percent chance for a Hispanic boy and a 4 percent chance for a white boy." (p. 125). "The degree to which arrest rates may explain the racial composition of the prison population has been examined by criminologist Alfred Blumstein…[who found] that, with the critical exception of drug offenses, higher rates of crime…were responsible for most of the high rate of black incarceration. In the 1991 study, for example, he found that 76 percent of the higher black rate of imprisonment was accounted for by higher rates of arrest. The remaining 24 percent of disparity might be explained by racial bias or other factors." (p. 127). "A report by the Federal Judicial Center found that in 1990 blacks were 21 percent more likely and Hispanics 28 percent more likely than whites to receive a mandatory prison term for offense behavior that fell under the mandatory sentencing legislation." (p. 138-139). Mauer goes on to demonstrate through data the racial disparities in the death penalty, sentencing, and the juvenile justice system.

Kentucky public defenders recently conducted a conference with the joint themes of eliminating racial discrimination and protecting the innocent. It was good that we as defenders focused for 3 days on the issue of race and how race is a pervasive factor in our criminal justice system. Other systems have likewise examined the issue of race; Chief Justice Lambert and former Chief Justice Stephens have been notable leaders in the quest for racial justice in the Kentucky criminal justice system. Governor Patton issued an Executive Order outlawing racial profiling. The Kentucky General Assembly recently passed the Racial Justice Act, the Racial Profiling Act, and the law to streamline the procedure for the restoration of civil rights for convicted felons. Kentucky is making much progress toward racial justice in our criminal justice system. Marc Mauer's book should assist us as we continue to struggle for racial justice in our criminal justice system, and should keep us from complacency. ■

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Books on: Race and Criminal Justice

The following is a listing of books held by DPA on issues related to Race issues in Criminal Justice. Please see one of the librarians for help with locating additional sources, such as journal articles, videotapes, handouts, or Internet resources.

Black Robes, White Justice. By Bruce Wright. (Secaucus, NJ, L. Stuart). 1987. KF 373 .W67 A33 1987.

The Death Penalty in Black & White: Who Lives, Who Dies, Who Decides: New Studies on Racism in Capital Punishment. By Richard C. Dieter. (Washington, D.C., Death Penalty Information Center.) 1998. HV 8694 .D53 1998.

Intended and Unintended Consequences: State Racial Disparities in Imprisonment. By Marc Maurer. (Washington, D.C., The Sentencing Project). 1997. HV 9950 .M37 1997.

Minorities in Juvenile Justice. By William Feyerherm. (Thousand Oaks, CA., Sage Publications). 1995. HV 9104 .M57 1995.

No Equal Justice: Race and Class in the American Criminal Justice System. By David Cole. (New York, New Press). 1999. HV 9950 .C58 1999.

Race to Incarcerate. By Marc Maurer. (New York, NY, New Press). 1999. HV 9950 .M32 1999.

Racial Violence in Kentucky, 1864-1940: Lynchings, Mob Rule, and "Legal Lynchings." By G.C. Wright. (Baton Rouge, LA, Louisiana State University Press). 1990. HV 6465 .K4 W75 1990.

Us and Them: A History of Intolerance in America. By Jim Carnes and Herbert Tauss. (New York, Oxford University Press). 1996. E 184 .A1 C335 1996. ■

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Restoration of Civil Rights

Diana Eads

Diana Eads, an administrative specialist in the Division of Probation and Parole, has seen her workload triple during the past nine months. It's her responsibility to handle applications for the restoration of civil rights – a process misunderstood by many.

About a year ago, Department of Corrections (DOC) officials began a different procedure regarding the completion of paperwork necessary for the restoration, predicated by the passage of legislation from the 2001 General Assembly. Previously, inmates were not made aware of the process in any formal manner, sometimes only learning they weren't allowed to vote when they showed up at voting precincts across the Commonwealth. Under state law, any individual convicted of a felony loses the right to vote and hold public office in Kentucky.

As a result of the new law, DOC notified all state institutions last June and required that inmates who "serve out," or complete their sentence, fill out the restoration application before leaving the prison. The result has been an overwhelming increase in the number of applications received and a slight slow down in the turn-around time.

To be eligible for the restoration, individuals:

- must have received a final discharge from parole, or their sentence must have expired;
- must have no pending charges; and
- must not owe any fines or restitution.

Eads, a five-year employee of the Department of Corrections in the Division of Probation and Parole, received 54 applications for restoration the first month she took over the process. The month after the inmates began completing the paperwork before they left prison, that number topped 150. In February, 178 applications were received.

"The only unfortunate result is it's slowed things down a little for us, in regard to turn around time," said Eads. "We used to be able to process and complete everything in two months, now it's more like three or four."

The restoration procedure also applies to convictions outside Kentucky and requires that individuals provide a copy of the conviction and evidence of final discharge from a parole officer.

Eads said once an application is received, she first checks the accuracy of the information provided by the applicant, including a check to make sure there are no pending charges against the individual. She then contacts the commonwealth's attorney in the jurisdiction where the crime was committed and in the county where the individual currently lives (if different) to see if they have any objection to the restoration of civil rights. The prosecutors have 15 working days to lodge any objection. If no objection is raised, the application is then sent to the Governor's Office.

It is the prerogative of the Governor, under the state's Constitution, to restore the civil rights.

The only charge for the restoration is a $2 fee, required by the Secretary of State's office, and paid by the applicant to the Kentucky State Treasurer.

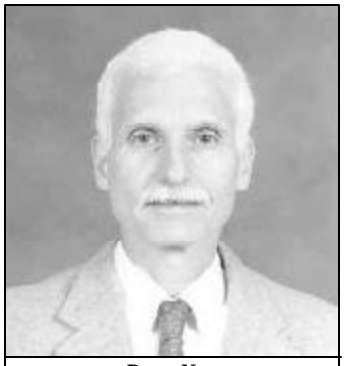
"The restoration of civil rights only involves the right to vote, hold public office, serve on a jury or obtain a professional or vocational license. It does not give an individual the right to own, possess, or purchase a firearm," explained Eads. "In order to have the right to bear arms restored, the individual must make application through the federal agency, the Department of Alcohol, Tobacco and Firearms (ATF), or receive a pardon from the Governor or the President of the United States."

Convicted felons who register to vote without receiving the civil rights restoration may be charged with violating the law and could face an additional sentence of up to five years in prison. ■

CJA fee increased to $90.00 Per Hour

On November 28, 2001 the President signed the Judiciary's FY 2002 appropriation bill, which includes funding for a CJA panel attorney rate increase to $90 per hour for work both in court and out of court. The increase is planned to take effect in May 2002.

The Cost of Our Convictions



Dave Norat

Can we afford our convictions? Kentucky's average cost to incarcerate is $17,849.05 per year vs. its cost of probation/parole supervision of $1,332.58 per year. The difference is $16, 516.47 per year.

Does it make good economic sense, especially in times of state revenue shortfalls, to incarcerate 3,341 property offenders and 3,279 drug offenders? These were the number of property and drug offenders housed in Kentucky's prisons in fiscal year 2000-2001. Property offenders represented 23% of the total incarcerated population in Kentucky for FY01. Drug offenders were 22% of the total people imprisoned. The combined drug and property offenders comprised 45% of the FY01 Kentucky prison population.

As the chart below indicates, the annual cost of incarceration even at a private minimum-security institution, like the Marion Adjustment Center, is a significant $11,623.03. That cost is more than eight times the cost of probation or parole supervision. As part of an effort to deal with prison and jail issues, convicted Class D offenders were authorized to be housed in local jails pursuant to KRS 532.100. In 2000 this statute was amended to include Class C offenders as well. The cost of housing a state prisoner in a local jail is $28.76 per day or $10,497.40 per year. As of March 2002 there were 2,772 Class D offenders in county jails and 464 Class C offenders.

With costs being $17,849.05 vs. $10,497.40 vs. $1,332.58, can we afford the costs of our convictions?

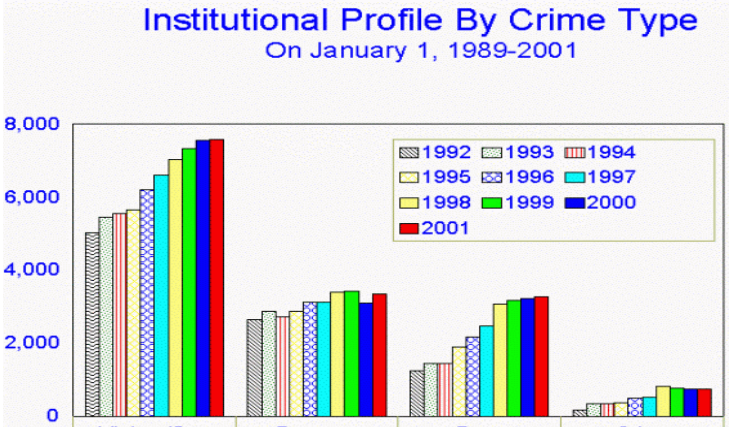
Kentucky Department of Corrections Cost To Incarcerate FY 2000-01

	COST PER DIEM[1]	COST PER ANNUM[1]
KY State Reformatory[2]	$73.35	$26,774.33
KY State Penitentiary	$60.22	$21,979.07
Luther Luckett Corr. Complex	$56.94	$20,781.29
Northpoint Training Center	$40.39	$14,741.17
KY Correctional Inst. for Women[2]	$54.22	$19,789.72
Blackburn Corr. Complex	$48.88	$17,842.41
Frankfort Career Dev. Center	$47.70	$17,410.57
Bell County Forestry Camp	$39.20	$14,308.54
Western KY Correctional Complex	$48.95	$17,865.31
Roederer Correctional Complex	$43.18	$15,762.22
Eastern Ky. Corr Complex	$35.52	$12,965.72
Marion Adjustment Center	$31.84	$11,623.03
Lee Adjustment Center	$40.36	$14,729.86
Green River Correctional Complex	$45.14	$16,475.12
AVERAGE COST	**$48.90**	**$17,849.05**
Maximum Security	$60.22	$21,979.07
Medium Security	$50.11	$18,288.43
Minimum Security- State Only	$46.00	$16,789.56
Private Institutions	$35.85	$13,084.50
Minimum Security - Private & Public	$39.78	$14,520.94
Cost To Supervise	**$3.64**	**$1,332.58**

1 These figures do not include: Fire loss, Correctional Industries, Agriculture, Construction, Debt Service, or Federal Grants
2 These institutions serve as the primary medical support for all institutions.

Department of Corrections Information Technology Branch, 12/27/01

Drug and property offenders have represented between 43% and 46% of the Commonwealth's prison population for the last ten years as indicated by the Department of Corrections data, which is indicated in the following chart.



	Violent/Sex	Property	Drug	Other
1992	5,023	2,648	1,242	163
1993	5,447	2,861	1,452	350
1994	5,541	2,725	1,434	352
1995	5,653	2,865	1,904	378
1996	6,206	3,112	2,170	489
1997	6,599	3,129	2,462	515
1998	7,019	3,397	3,077	812
1999	7,320	3,430	3,166	767
2000	7,536	3,088	3,215	744
2001	7,562	3,341	3,279	743

Department of Corrections Information Technology Branch, 12/27/01

From FY96 through FY02, expenditures for the Kentucky Department of Corrections has increased by 43.6%. That compares to the growth in revenues for the General Fund as a whole of 25.8%. Over time, Kentucky is spending an increasing percentage of its limited General Fund for Kentucky. While serious crime is in decline in Kentucky and nationally, the Kentucky felon population continues to grow at a modest rate driven in large part by increased drug and drug-related offenses. See *2002-2004 Executive Budget - Highlights of the Executive Budget and Legislative Priorities*, Department of Corrections 1/22/02.

A reduction of 5% (or 331) fewer drug and property offenders housed in our state prisons would result in an annual saving of $5,908,035.55 in prison incarceration costs. The cost of 7 new probation/parole officers with a caseload of 50 offenders per officer to provide probation/parole supervision is $315,0000 ($45,000 per officer to cover salary, benefits and operating). If this cost of probation supervisor were subtracted from the cost of incarceration, a balance of $5,593,035.55 would be left for increased community program funding to meet the supervision needs of the probation/parole officers and the specific needs of offenders. Also, these funds could provide funding for programs meeting the needs of others in the community besides offenders. Even using the lowest annual cost to incarcerate, the $10,497.40 annual cost to Corrections to house Class C and D offenders in local jails, this shift realizes a significant savings of $3,159,639.40 for community programs benefiting all in the community. Local jail beds made available by this reduction could be used as halfway house beds or transitional living beds. That cost may be able to be met by the offender due to their employment while in the halfway housing

The legislature in KRS 533.010 has informed the criminal justice system of its conviction. The legislature has committed to probation and community based alternatives. Part of this message is being heard. The Kentucky Department of Corrections projects a probation and parole population growth of 1,093 in FY03 and 1,017 in FY04 (Source: Kentucky Department of Corrections). But, what about the growth in drug and drug-related offenses? Seeing what just a 5% reduction in who we supervise in the community versus who we house in our prisons can mean to our communities should cause us to stop and ask the question. $17,849.05 vs. $10,497.40 vs. $1,332.58, can we afford the costs of our convictions?■

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Instant Prelims

From time to time, the District Court Column will feature "Instant Prelims," a short checklist designed to help prepare a cross-examination on one or more issues that frequently occur in preliminary hearings. Recognizing that defense attorneys often have a week or less between the arraignment and the preliminary hearing, "Instant Prelims" is designed to give a succinct statement of the law on the issue and a few tips on where and how to quickly get a witness or evidence on a low-budget or no-budget basis. The information or ideas in these short pieces will seldom be new to anyone who does a lot of preliminary hearings. However, these tightly packaged checklists may come in handy for those with little time to brush up on the law. Whether the goal is to get a dismissal, get an amendment to a lesser charge, or commit the Commonwealth to a version of facts early in the case, it is hoped that "Instant Prelims" will be useful. If anyone out there has an idea and would like to submit for publication an "Instant Prelim" of his or her own, please contact Jeff Sherr, District Court Column Contributing Editor, *The Advocate*, or Scott West.

DISTRICT COURT COLUMN

Trafficking Within 1000 Yards of a School

B. Scott West

KRS 218A.1411 provides in pertinent part that "any person who unlawfully traffics in a controlled substance classified in Schedules I, II, III, IV, or V…in a school or on any premises located within one thousand (1000) yards of any school building used primarily for classroom instruction shall be guilty of a Class D felony…."

Whenever a local newspaper reprints this week's district court docket which lists so-and-so as being charged with trafficking drugs within 1,000 yards of a school, a certain imagery pops into the minds of lots of readers. They see the drug dealer who is sitting in his van just outside the school yard fence with a suitcase full of pills or a bale of marijuana in the back, just waiting for a second or third grader to come out and use his lunch money to buy a pill. Those of us who handle trafficking cases know that is an extreme, rarely seen case. For criminal defense attorneys, a routine "trafficking" case is where a drunk driver is pulled over in his vehicle at midnight, half a mile away from the nearest school, and the police discover three nickel bags of marijuana in the trunk. There is no sale or transfer of drugs to another person, but the packaging and the quantity of the pot – at least to the officer – suggests more than personal use. The driver, now your client, says he was not going anywhere near the school, where no one would be at this hour anyway, and was going toward home, in the opposite direction. Yes, the pot is his, but he got it for his own personal use and he divided it into baggies only because he wanted to be able to carry a little bit with him wherever he goes, much like someone would take a pouch of chewing tobacco, a pack of cigarettes, or a tin of dip. He should be charged with possession of marijuana, a misdemeanor, but not trafficking within 1000 yards of a school, a felony. If you can have the charge reduced to a misdemeanor, your client will accept responsibility.

The preliminary hearing is one week away. Let's get ready for the prelim.

☐ **Is it really 1000 yards?**

KRS 218A.1411 "Trafficking in controlled substances in or near school" requires that the measurement be done in a straight line from the nearest wall of the school to the place of violation. Ask the arresting officer how he measured the distance.

- Sometimes, an officer will measure from the farthest edge or fence of a schoolyard or parking lot instead of a wall of the school. Sometimes, the building may be a stand-alone gymnasium where classes are not taught at all. Sometimes it may be a school bus garage. Find out the exact point of measurement.

- Sometimes, there is no measurement at all – it's just a guess. It can be a good guess, though. A mile is 1,780 yards. Thus, 1000 yards is just under 6/10's of a mile on the odometer. Maybe the officer is measuring based on the odometer. If the odometer says the violation occurred 2/10's of mile from the school, the measurement may not be in doubt. But if the odometer is 5/10's of mile, maybe it is time to get the tape measure out.

- Was GPS (Global Positioning Satellite) technology employed? This is becoming more and more popular with police departments. A house on the other side of a hill can be within 1000 yards "as the crow flies" even though driving there covers may put two on the odometer, and walking there – over the mountain – would be 1,200 yards. GPS, I am told, is generally accurate. But according to a hunting journal to which I subscribe, which published an article on

GPS some years ago, there is a margin of error of at least 30 yards built into commercially available GPS units, for national security and military reasons. Do you have GPS or know someone who does? If so, have an investigator or associate run your own independent test before the preliminary hearing. If the arrest was clearly within 1000 yards of a school, you do not have to disclose that to anybody. On the other hand, if it is less than 1000 yards are within the margin of error (check the manual), you might have an instant surprise witness who can combat an officer's guesstimation of the distance.

☐ Is it really "trafficking?"

Make sure the officer states each and every basis for the trafficking charge while he is on the stand. It is critical to nail him or her down on the specific reasons for the charge. Did the officer actually see drugs pass from one person to another, or is the basis of the charge merely the amount of drugs found in possession of the defendant?

According to the drug code, "'Traffic,' except as provided in KRS 218A.1432 [which applies to methamphetamine cases only], means to manufacture, distribute, dispense, sell, transfer, or possess with intent to manufacture, distribute, dispense, or sell a controlled substance." KRS 218A.010(28).

"Transfer" in turn, "means to dispose of a controlled substance to another person without consideration and not in furtherance of commercial distribution." KRS 218A.010(29).

- If the officer sees a drug change hands – even if it is the passing around of a lit joint – the offense of trafficking has been completed. A "sale" or changing hands of money is not necessary. Of course, if the officer saw a transfer, he will definitely state so on the stand.

- With the use of a confidential informant (CI), the evidence of a transfer may be circumstantial. The CI goes in with marked money, comes out with a drug, and the subsequent arrest finds the money on the defendant. Was a tape made of the transaction? If not, this opens the inquiry into what steps the officer took to make sure the CI actually performed as he was supposed to in the sting. After all, the CI has an agenda: In order to derive some benefit from the police (maybe a lesser sentence on his own case), he has to leave money with the defendant, and come back with drugs. If the defendant does not complete a sale to the CI – either because he is suspicious, or, consider this, Officer, ACTUALLY INNOCENT – the CI, who still desperately needs his lesser sentence, is under pressure to produce what the police sent him in to get. Without a tape, how he actually accomplishes this is open for speculation and argument.
  - √ Was he searched before he met the defendant?
  - √ Was it a pat-down, or a full blown body search, including a cavity search?
  - √ Was the CI ever out of sight of the police after he left the police and before he returned? (In other words, could he have stashed the drugs somewhere and picked them up along the way?)
  - √ What steps did the officers take to make sure that the money was not left for a purpose other than a sale? (How do the police know the CI didn't just pay back money he owed the defendant?)
  - √ Did the CI come back with the drug and quantity he was supposed to? (If the CI was sent to get a ball of crack and comes back with Lortabs, maybe the CI could not make a sale and Lortabs was all he had in his personal stash.)
  - √ Was there supposed to be a tape, but it came back muffled or inaudible? (If so, maybe the CI put his hand over the microphone because the deal was not going down like it was planned.)
  - √ Bottom Line: What steps did the police take to ensure that the CI did not fake a sale? If none, get it on the record at the preliminary hearing.

- Was the basis of the trafficking charge mere possession with intent to traffic? In *Hargrave v. Commonwealth,* Ky., 724 S.W.2d (1986), a trafficking conviction was upheld where the defendant was found in possession of 20 bags of heroin. While 20 separate packages of anything may support a trafficking charge, at least at the preliminary hearing level, it does not follow that 20 pills in a single container will. The fact that 20 people could each purchase or take a pill of 40 milligrams of Oxycontin does not mean that was the intended use. If a known addict requires a dosage of 320 milligrams to achieve a "high," 20 such pills provides only two and a half "highs." Even under a probable cause standard –recall that "probable cause" is a more stringent standard than "reasonable suspicion," *see Illinois v. Wardlow,* 120 S.Ct. 623 (2000) – it is far more reasonable that the defendant is supporting his habit, not trading in the pills. Argue that the charge should be amended to possession, not trafficking. This person is an addict/user, not a trafficker, and the charge should match the activity.

☐ Is it really a "school?"

- What exactly is a school? "Statutory language should be given its ordinary meaning unless such language has a peculiar meaning in the law." *See Sanders v. Commonwealth,* Ky. App., 901 S.W.2d 51 (1995), which held that "school" was broad enough to encompass colleges and universities. Obviously, a high school or a grade school. Similarly, "rodeo school" or "clown school" do not immediately spring to mind as places of learning for purposes of the statute.

Continued on page 28

Continued from page 27

- What about Montessori Schools or day cares? The Kentucky Court of Appeals answered in the affirmative as to the former, but seemingly implied the negative as to the latter. In *Brimmer v. Commonwealth*, Ky. App., 6 S.W.3d 858 (1999) the Court stated:

> The testimony presented here before the circuit court shows that ABC's primary focus is educating children ages three through nine. **While ABC once was a day care center, for the last eight years it has been a Montessori school.** The owner/director of ABC is a certified Montessori teacher who received training through the University of Kentucky. ABC's informational brochure describes it as a private school open to all children regardless of race, nationality or financial status. ABC's curriculum includes reading, mathematics, geography, history, practical life skills, science, creative development in art, dramatics, creative expression and music…[Emphasis added.]
>
> The director further testified that ABC's program is a total learning program similar to primary education in public schools…

The factors listed in *Brimmer* were meant to distinguish a school from a day care. If a day care were also a "school," there would be no reason for the Court of Appeals to so distinguish it.

- Try to persuade the district court judge not to pass over the issue of whether a building is a school on the ground that it is "for the jury to decide." Whether a building is a "school" is a question for the Court, not the jury. In *Brimmer*, the Court of Appeals stated that "the circuit court correctly analyzed the common dictionary definition of 'school' and determined that ABC constitutes a 'school.'" The circuit court had ruled that the Montessori School was a school building used primarily for classroom instruction following a hearing in which testimony was taken. The issue was not submitted to a jury for decision, but was considered a question of law by the circuit judge, and ultimately the Court of Appeals. The district judge is no less empowered than a circuit judge to answer questions of law, and can make such a ruling if the evidence warrants it.

- Consider speaking with the owner/director of the school or day care and inquire about any laws or regulations under which the enterprise operates. Sometimes, federal or state law will mandate that a day care identify with particularity the functions it intends to perform. It may be illegal for a day care to function as a school, and vice-versa. Check the brochures, yellow pages, newspaper adds or websites of any facility which holds itself out to be a day care or school. If you are able to secure the answers you want, you can always subpoena the director to the preliminary hearing, and provide the Court with the evidence that the institution is not a school.

Okay, so there are no earth-shattering or novel ideas contained in any of the above. Most if not all of the concepts above addressed have been employed by you defense lawyers out there for years. Nevertheless, this article can be a handy, brief checklist of issues and ideas to raise (or not raise, depending on your case) at a prelim. If nothing else, it can serve as a "tickler" so you do not forget any possible defenses or case problems that you will have to overcome.

{If you would like to see more of these type of articles – or less of them – please notify the District Court Column Contributing Editor of *The Advocate*, Jeff Sherr. The goal of the column is to be as worthwhile and user-friendly as possible. This goal can only be accomplished if readers let us know what is working, and what is not.) ■

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It is not the critic that counts; not the man who points out how the strong man stumbles. Or where the doer of deeds could have done better. The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood; who strives valiantly; who errs, and comes short again and again, because there is no effort without error and shortcoming; who knows the great enthusiasms, the great devotions; who spends himself in a worthy cause; who at best knows in the end the triumph of high achievement. And at worst, if he fails, at least fails while daring greatly, so that his place shall never be with those cold and timid souls who know neither victory nor defeat.

— President Theodore Roosevelt, "The Man in the Arena", Paris, 1910

KENTUCKY CASELAW REVIEW

Steven Bray v. Commonwealth,
Ky., __ S.W.3d __ (02/21/02)
(Reversing and remanding for a new trial)

In November of 1982, a mobile home in Marshall County burned to the ground. Found inside were the bodies of Effie York and her daughter, Audrey Bray. Both victims had received gunshot wounds to the head prior to the fire. As part of the investigation, Steven Bray, Audrey Bray's estranged husband, was sought for questioning. It was soon learned that Steven Bray had not been seen since the day of the crimes. Eventually, the Federal Bureau of Investigation (F. B. I.) became involved and a federal charge was brought against Bray for unlawful flight to avoid prosecution. Over a decade later, in 1995, Bray was located in Toronto, Canada, where he was living under a false name, and he was extradited to Kentucky for prosecution. After a jury trial, Bray was convicted of two counts of murder and first-degree arson. He was sentenced to life in prison.

Affidavit Supporting Restraining Order Contained Inadmissible Hearsay

On appeal, Bray argued that an affidavit supporting a restraining order filed by Audrey Bray in conjunction with a divorce petition should not have been admitted because it contained inadmissible hearsay. The affidavit, which was filed one year and five months prior to the crimes, contained allegations of physical abuse. The Supreme Court agreed, holding that the affidavit does not fall within the business records exception to the hearsay rule [KRE 803(6)] because the alleged victim was not acting within the normal course of business when filing the motion and supporting affidavit. The Court noted that affidavits supporting restraining orders might not be trustworthy, as parties may falsify or exaggerate the circumstances to improve the likelihood that their motion will be granted. Also, the Court held that the former testimony exception to the hearsay rule [KRE 804(b)] was not applicable because the affidavit was not comprised of testimony taken at a hearing or deposition where cross-examination can occur. Finally, the Court held that the affidavit did not fall within the public records exception to the hearsay rule [KRE 803(8)] because the affidavit was not made by a public agency pursuant to its lawful responsibility.

Statements of Effie York Not "Present Sense Impression"

Bray argued that the testimony of Audrey Bray's sister, Ernestine Goins, contained inadmissible hearsay. At trial, Goins testified to statements made to her over the telephone by Audrey and Effie York on the night of the crimes. Audrey told her that Bray was at the foot of the hill, and that she could hear him coughing and that he was lighting cigarettes and had a flashlight. York then got on the line and said that she was not afraid of Bray because she had never hurt him, but that she feared for Audrey's life. The Court held that Audrey's statements were admissible under the "present sense impression" exception to the hearsay rule because her statements were made while she was observing, through sight and sound, Bray's presence near her house. However, the Court held that York's statements were not covered by the "present sense impression" exception because her comments described her emotional state, past facts and her state of mind.

Bray's Reaction Upon Hearing of the Murders Admissible Under "Excited Utterance" Exception To Hearsay Rule

At trial, Bray attempted to offer the testimony of his sister regarding his reaction to hearing of the murders under the "excited utterance" exception [KRE 803(2)] to the hearsay rule. The trial court ruled that such testimony did not fall within the exception because of the time lapse between the murders and the time Bray was told about them (two days). On avowal, Bray's sister testified that when she informed Bray of the deaths he "let out a bloodcurdling scream" and said "Oh my god, not Audrey." Applying the eight-factor test found in *Jarvis v. Commonwealth*, Ky., 960 S.W.2d 466 (1998), the Supreme Court held that Bray's reaction to the news of the murders was admissible as an "excited utterance." The Court noted that the triggering exciting event occurred when Bray heard about the deaths, rather than when the deaths actually occurred.

First-Degree Manslaughter Instruction Not Warranted - Extreme Emotional Disturbance Speculative

The Court held that Bray was not entitled to a lesser-included instruction on first-degree manslaughter. Although there was testimony that Bray received a letter from his estranged wife that would have upset "anyone," there was no evidence that Bray actually had a severe emotional response. "When the existence of emotional disturbance is speculative, there should be no first-degree manslaughter instruction." *Morgan v. Commonwealth*, Ky., 878 S.W.2d 18, 20 (1994).

Evidence That Bray Was Featured On <u>America's Most Wanted</u> Inadmissible

The Court held that testimony that Bray's case was featured on the popular television show *America's Most Wanted* was prejudicial and inadmissible, but found no abuse of discretion when the trial court denied a mistrial. The Court ruled

Continued on page 30

Continued from page 29

that evidence that Bray fled to Canada was admissible, but anything pertaining the television show should be kept out on re-trial.

"Unlawful Flight To Avoid Prosecution" Warrant Inadmissible

Bray argued that testimony that he had been charged with the collateral federal crime of unlawful flight to avoid prosecution should not have been admitted into evidence. The Commonwealth claimed that such testimony was allowed under *Commonwealth v. Howard*, Ky., 287 S.W.2d 926 (1955) as a "fact and circumstance" showing evasion and resisting arrest. The Court held that the fact that Bray had fled that country and had been captured through the coordination of the United States and Canadian authorities was properly admitted. However, that Court found that the collateral criminal charge itself was not a "fact and circumstance" surrounding Bray's fleeing the country and was highly prejudicial and irrelevant to the proceedings.

Second-Degree Arson Instruction Should Have Been Given; No Directed Verdict On First-Degree Arson

Bray argued that he was entitled to a second-degree arson instruction. Since the two victims were already dead from gunshot wounds before the home was set on fire, the jury could have believed that the house was not inhabited or occupied by living persons. The Commonwealth maintained that the first-degree arson statute is designed to cover the destruction of "dwellings," while the second-degree arson statute is designed to cover other situations such as arson for profit. The Court held that the jury should have been instructed on second-degree arson, noting that the evidence in the case could have permitted the jury to conclude that the victims had been killed before the fire was started. However, since the evidence was inconclusive as to whether the victims were living or dead at the time the house was set afire, the Court held that the trial court did not err by failing to direct a verdict on first-degree arson.

Statement Opened The Door To Questions About Prior Shooting Incident

The Court also held that Candie Bray's statement on cross-examination that Bray was afraid of Mary York because she was "out to get him" opened the door to further questioning regarding the meaning of her statement. Therefore, there was no error when the Commonwealth responded that it was Bray who assaulted Mary and continued to question Candie concerning the events of the assault which involved a "shooting incident" for which Bray was criminally charged.

***Bennie L. Gamble, Jr. v. Commonwealth,* Ky., __ S.W.3d __ (02/21/02) (Reversing and remanding for a new trial)**

Gamble, Chasidy Bradley and Barbara Neill were arrested and indicted for the robbery and murder of William Tolbert. While Gamble maintained his innocence, Bradley and Neill gave statements about their involvement, as well as Gamble's, in the crimes. Neill eventually pled guilty and testified against Bradley and Gamble in exchange for a 25-year prison sentence. Bradley and Gamble were tried together. Both were convicted of first-degree robbery and murder. Bradley received a 25-year sentence. Gamble was sentenced to life in prison. Gamble is African-American, while the victim was Caucasian, as are Bradley and Neill.

***Batson* Objection Timely, But No *Batson* Violation Found**

The Commonwealth used its peremptory challenges to strike three of four African-American jurors from the venire. Gamble challenged the Commonwealth's use of its strikes as racially motivated. The Court found Gamble's Batson objection to be timely made where defense counsel raised the objection as soon as practicable after the 14 jurors names were called and before the jury was sworn. However, the Court found no *Batson* violation where the Commonwealth offered the following grounds for its peremptory challenges: the prosecutor tried a murder case against a prospective juror's son who was ultimately convicted of murder; a prospective juror's brother had successfully sued and recovered a judgment against a police officer/department for false arrest; a prospective juror was approached by a witness in the case and had spoken about the case, and she had recently been stopped by the police and charged with a series of traffic offenses. The Court noted that "[t]he trial court may accept at face value the explanation given by the prosecutor depending upon the demeanor and credibility of the prosecutor." *Stanford v. Commonwealth*, Ky., 793 S.W.2d 112 (1980).

Trial Court Erred In Refusing To Strike Juror With Racist Views

On appeal, Gamble argued that the trial court erred in failing to exclude racist jurors for cause, compelling him to exercise his peremptory challenges on incompetent jurors. During voir dire, Juror #54 indicated that he had moved from his prior neighborhood because he had a young daughter and he "never felt safe" because there were "black guys" always around the house. He indicated strong opposition to interracial relationships, stating that he generally thought of people involved in such relationships as low class, and of low class people as more likely to commit crime. Juror #54 further stated that he could not deny his prejudices and that upon entering the courtroom he automatically assumed Gamble to be the defendant because he "figured a black had to be the person accused." Despite having made these statements, when asked

the "magic question" by the Commonwealth, Juror #54 also stated that he could be fair and reach a decision based solely on the evidence.

The Supreme Court held that Juror #54 should have been excluded for cause. The Court found that Gamble had exercised all of his peremptory challenges and that Juror #54 indicated such strong bias that he could not be rehabilitated by the "magic question." Quoting *Montgomery v. Commonwealth*, Ky., 819 S.W.2d 713, 718 (1991), the Court found that further questions do "'not provide a device to 'rehabilitate' a juror who should be considered disqualified by his personal knowledge or his past experience, or his attitude as expressed on voir dire.'" Finally, the Court reaffirmed its holding in *Thomas v. Commonwealth*, Ky., 864 S.W.2d 252 (1993) that automatic reversal is required when a defendant exercises a peremptory challenge to remove a juror that should have been removed for cause. It is not necessary to show that the unqualified juror actually sat on the jury.

Justice Keller, joined by Justices Graves and Wintersheimer, dissented. Justice Keller agreed that Juror #54 should have been struck for cause. However, Justice Keller would find the error harmless because Juror #54 did not sit on the case and calls for *Thomas v. Commonwealth*, Ky., 864 S.W.2d 252 (1993) to be overruled.

Sex Offender Registration Act -
"Megan's Law" – Is Constitutional

William Keith Hyatt, Jr. v. Commonwealth,
Ky., __ S.W.3d __ (02/21/02)
and
Dennis Gilbert Hall v. Commonwealth
and
Commonwealth of Kentucky v. Nathaniel Sims

(Affirming in part, reversing and remanding in part)

Three cases arose out of three Kentucky Court of Appeals' opinions rendered by three different panels concerning the constitutionality of the Sexual Offender Registration Act, KRS 17.500 et seq. ("Act"), commonly known as "Megan's Law." All three opinions involve an appeal from a circuit court Sex Offender Risk Determination, classifying each of the defendants as being released as a "high risk sex offender," requiring lifetime registration unless re-designated. *Hyatt* affirmed the constitutionality of the statutes but reversed and remanded for a new risk assessment hearing. In *Hall*, a split panel affirmed the order. In*Sims*, which also includes a cross-appeal, the panel unanimously reversed and vacated, declaring the entire statutory system unconstitutional as a violation of the state constitutional separation of powers provisions. The Supreme Court accepted discretionary review in order to reach a definitive disposition of the constitutional questions involved.

Act Not Ex Post Facto Law

After examining how other state and federal courts have ruled on this issue, the Court held that the retroactive application of the sexual offender classification, registration and notification system is constitutional. The statutes do not amount to an ex post facto violation. "Registration and Notification Statutes across the nation have consistently been held to be remedial measures, not punitive, and therefore do not amount to punishment or increased punishment.... The registration laws do not punish sex offenders. They have a regulatory purpose only. The dissemination of information has never been considered a form of punishment." The Court found that the designation of a sexual predator is not a sentence or a punishment, but simply a status resulting from a conviction of a sex crime.

Act Does Not Violate A Defendant's Right Of Privacy

The Court held that the registration and notification system does not violate a defendant's liberty interest in privacy or reputation under the state or federal constitutions. "The Commonwealth of Kentucky has a serious and vital interest in protecting its citizens from harm which outweighs any inconvenience that may be suffered because of the notification and registration provisions."

Act Does Not Violate Separation Of Powers Doctrine

The Court held that the allocation of jurisdiction to the circuit courts to conduct a risk determination hearing does not violate separation of powers principles. "This Court has recognized the authority of the legislature to enact statutes regarding the jurisdiction of the court. Here, the legislature assigned to the circuit courts the duty of conducting classification hearings in connection with a legislative act requiring assessment for the purpose of community notice." In addition, the Court noted that risk assessment proceedings are similar to a persistent felony offender proceeding. As such, the circuit courts are not re-opening a criminal conviction.

Act Does Not Violate Principles of Double Jeopardy

Finally, the Court held that the Act does not violate principles of double jeopardy.
"None of the elements of the registration act run afoul of the double jeopardy analysis provided by this Court in*Hourigian v. Commonwealth*, Ky., 962 S.W.2d 860 (1998), or the United States Supreme Court in *Hudson v. United_States*, 522 U.S. 93, 118 S.Ct. 488, 139 L.E.2d 450 (1997)."

Act Does Not Violate Sections 47 And 51
Of The Kentucky Constitution

In a companion case decided on the same day, *Martinez v. Commonwealth*, Ky., __ S.W.3d __ (02/21/02), the Court held

Continued on page 32

Continued from page 31

that the Sex Offender Registration Act does not violate sections 47 and 51 of the Kentucky Constitution. Section 47 of the Kentucky Constitution requires that all revenue raising bills originate in the House of Representatives and not in the Senate. The Court found that the Act was not revenue raising, despite the fact that the Commonwealth would lose federal grant money if it failed to enact some type of sex offender registration legislation. Section 51 of the Kentucky Constitution provides that the legislature cannot enact a law that relates to more than one subject. The Court held that the Act did relate to one subject. "The title in this instance is neither false nor misleading.... This title accurately reflects the contents and purpose of the legislation."

***Commonwealth of Kentucky v. Joseph Gaitherwright*, Ky., __ S.W.3d __ (03/21/02)**
(Certifying the law)

Refusal Of First-Time DUI Offenders To Submit To Breath, Blood or Urine Test Not An Aggravating Circumstance For Enhanced Penalties

Gaitherwright was charged with DUI, first offense, under KRS 189A.010(11)(e). Gaitherwright refused to submit to a breath, blood or urine test. Consequently, prior to trial, the Commonwealth moved the district court for a ruling that Gaitherwright's refusal to consent to testing required an instruction that his actions constituted an aggravating circumstance which would subject him to enhanced penalties. The trial court denied the motion based on the literal language of KRS 189A.010(5)(a), and ruled that first-time DUI offenders are not subject to penalties for the refusal to submit to breath, blood or urine testing. The trial court reasoned that the act of refusal is not contemporaneous with the act of operating a motor vehicle. Gaitherwright was ultimately convicted and monetary fine of $500.00 was imposed.

The Commonwealth requested certification of the law in the Supreme Court of Kentucky as to the following question:

> Whether the refusal to submit to a breath, blood or urine test on a first offense DUI charge is an aggravating circumstance under KRS 189A.010(11)(e) which, if found to have occurred, subjects the defendant to enhanced penalties pursuant to KRS 189A.010(5)(a).

After reviewing the law of statutory construction and after analyzing KRS 189A.010(5)(a), which sets forth the effect an aggravating circumstance has on a first-time DUI offender, the Court stated that "it is clear from the plain language of subsection (5)(a), to the effect that the aggravating circumstance must be 'present while the person was operating or in physical control of the motor vehicle,' that that Legislature intended to exempt first-time offenders who refuse testing from an aggravated sentence." The Court found this was the most logical interpretation because the refusal cannot occur simultaneously with the operation of a motor vehicle, as the testing occurs at the site where the breathalyzer is located. Accordingly, the Court certified the law as follows: First-time DUI offenders are exempt from aggravated penalties for failure to submit to blood, breath or urine testing.

The Court noted, "contrary to the Commonwealth's position, a literal interpretation of KRS 189A.010(5)(a) does not permit a first-time DUI offender to refuse testing with impunity." The consequences for refusing to submit to testing include automatic suspension of one's driver's license regardless of whether there is a conviction for the underlying offense (KRS 189A.105); a duty of the prosecutor to oppose any amendment of the DUI charge to a lesser offense (KRS 189A.120); and a denial of hardship privileges (KRS189A.410). "Subsection (5)(a), in providing that the aggravating circumstance must occur while the person was operating or in physical control of the vehicle, simply excludes the refusal to submit to testing from the aggravating circumstances applicable to a first offense DUI." ■

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Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly.

- Martin Luther King, Jr., Letter from the Birmingham Jail, April 16, 1963

6th Circuit Review

Emily Holt

Burroughs v. Makowski
282 F.3d 410 (6th Cir. 2/28/02)

Procedural Default Where Petitioner Failed to Present Claims at Appropriate Time In State Review and State Court Refused to Review Merits of Claim for this Reason

The 6th Circuit reverses the district court's grant of a writ of habeas corpus because all of Mr. Burroughs' claims were procedurally defaulted.

Federal courts cannot review habeas claims under § 2254 when "a state court decline[s] to address a prisoner's federal claims because the prisoner has failed to meet a state procedural requirement." *Coleman v. Thompson*, 501 U.S. 722, 729-730 (1991). Under procedural default analysis, federal courts "must determine if a petitioner failed to comply with a state procedural rule; and it also must analyze whether the state court based its decision on the state procedural rule." *Simpson v. Jones*, 238 F.3d 399, 406 (6th Cir. 2000).

In the case at bar, the state court refused to review Burroughs' second post-conviction motion because, in violation of Michigan state criminal rule (MCR) 6.508(D)(3), he presented grounds that could have been raised on direct appeal or in his prior post-conviction petition, and failed to show cause and prejudice to excuse his failure in not presenting the claims earlier. The state court specifically stated that it would not grant Burroughs' relief because of the violation of MCR 6.508(D)(3). The Michigan court's "statements that Burroughs was not entitled to relief under MCR 6.508(D) presents a sufficient explanation that their rulings were based on procedural default." The 6th Circuit therefore reverses the district court's grant of a writ of habeas corpus. It must be noted that this denial of the writ occurred despite the fact that several earlier state and federal courts expressed doubt about whether Mr. Burroughs committed the crimes with which he was convicted (felony murder, armed robbery).

Monzo v. Edwards
281 F.3d 568 (6th Cir. 2/22/02)

This case involves analysis of both trial and appellate counsel ineffective assistance of counsel claims. In 1987, Patricia Groseck was raped by a male intruder. It was not until 1993, when the Automated Fingerprint System (AFIS) was developed, that Mr. Monzo was charged with raping Ms. Groseck. Monzo's defense at trial was two-fold: (1) that his fingerprints were found at the Groseck home because he was working for a contractor who was renovating the house and (2) that he could not have been at Ms. Groseck's residence on the date the rape occurred because he was visiting his parents in another state. Mr. Monzo was ultimately convicted by an Ohio jury of aggravated burglary, kidnapping, and 2 counts of rape.

Procedural Default of Federal Claims Because of *Res Judicata*

The 6th Circuit first concludes that 4 of Mr. Monzo's 7 IAC claims were procedurally defaulted. Three of these IAC claims involve trial counsel, while the fourth claim involves ineffective assistance of appellate counsel. The state Court of Appeals denied the IAC of trial counsel claims on the grounds of *res judicata*. In Ohio, *res judicata* has long been held to bar consideration of claims in post-conviction where the claims could have been litigated before judgment or on direct appeal of the judgment. In the case at bar, "*res judicata* was an adequate and independent state procedural ground upon which the state court actually relied to bar consideration of the ineffective assistance of counsel claims asserted" in 3 of Mr. Monzo's 7 habeas claims.

Ineffective Assistance of Appellate Counsel Cannot Serve as Cause for Procedural Default of Other Claims Where that Claim is Also Defaulted

Mr. Monzo argues that ineffective assistance of appellate counsel excuses the procedural default, but the 6th Circuit disagrees. "Attorney error does not constitute 'cause' unless it arises to the level of a constitutional violation of the right to counsel under *Strickland*." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). However, it is not even necessary to consider that in the case at bar because the ineffective assistance of appellate counsel claim itself is procedurally defaulted and thus cannot serve as cause for the other procedural defaults. *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000).

The IAC-appellate counsel claim was first presented in a Rule 26(B) motion to reopen Monzo's appeal filed in 1998. This motion was denied by the Ohio courts because it was untimely. A motion to reopen an appeal must be raised within 90 days of the appellate judgment unless good cause is shown. The claim could have been raised in 1996 in his post-conviction proceedings. The 6th Circuit concludes that the Ohio courts relied on an adequate and independent state procedural ground to foreclose review of the IAC of appellate counsel claim.

Test for Appellate Ineffective Assistance of Counsel: Were Ignored Issues Clearly Stronger than Issues Presented?

The 6th Circuit nevertheless considers the merits of the IAC of appellate counsel claim. The Court first notes "it is not

Continued on page 34

Continued from page 33

necessary for appellate counsel to raise every nonfrivolous claim on direct appeal." *Jones v. Barnes*, 463 U.S. 745 (1983). "The process of 'winnowing out weaker arguments on appeal' is 'the hallmark of effective appellate advocacy.'" *Id.* at 751-752. "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986).

Monzo specifically claims that appellate counsel was ineffective when it failed to argue that trial counsel was ineffective by failing to (1) move for suppression of evidence or dismissal of charges because of destruction of the victim's rape kit and (2) move for dismissal of the charges as a violation of the statute of limitations for rape indictments or unjustified pre-trial delay. As to the destruction of the rape kit (this occurred in 1990), this evidence was only "potentially useful" and the government was merely negligent in destroying the evidence. *Arizona v. Youngblood*, 488 U.S. 51 (1988) was not violated by destruction of the rape kit. As to the argument that the statute of limitations was violated, a criminal complaint and an arrest warrant were filed four months before the statute of limitations would have run, and under Ohio law, this marked the commencement of the criminal prosecution. It does not matter that the indictment was not returned until the statute of limitations had run. As to pre-indictment delay, Monzo has failed to offer proof that the prosecution delayed indictment in order to gain tactical advantage over him, *U.S. v. Brown*, 959 F.2d 63, 66 (6th Cir. 1992). In fact, there was no evidence that Monzo had ever been identified as a suspect prior to the AFIS identification.

Trial Counsel IAC Claims-
No "Unreasonable Application" of
***Strickland* by State Courts**

Finally, the 6th Circuit reviews the remaining 3 ineffective assistance of trial counsel claims that were not procedurally defaulted. Monzo's claim is that the state court's decision on these claims involved an unreasonable application of *Strickland*.

The 6th Circuit summarily rejects these claims. First, as to Monzo's argument that trial counsel erred in not calling more alibi witnesses, the Court notes that several alibi witnesses were called at trial and the jury chose not to believe them because of the very persuasive fingerprint evidence. "It is unlikely that the presentation of further alibi evidence would have impacted the jury's decision." As to Monzo's claim that trial counsel erred when it failed to seek some discovery from the prosecution, the Court accepts trial counsel's testimony that if he would have sought this discovery, he would have had to turned over some of the defense investigation under the Ohio reciprocal discovery rule. Monzo also argues that counsel was ineffective for failing to obtain credit card receipts showing he was out of state at the time of the rape and W-2 forms proving he had worked extensively on the remodeling of the victim's house. Absent Monzo's procurement of these records at this point to prove their necessity, it cannot be said that these records were exculpatory. Counsel was also not ineffective in providing Mr. Monzo's employment records to the prosecution pre-indictment. These records led to the prosecution's calling of a witness at trial that seriously damaged the defense's case. The Court notes that, while in hindsight this may not have been the wisest move by trial counsel, at that point counsel was relying on Monzo's claims of innocence and was doing everything possible to avoid an indictment. Similarly, counsel was not ineffective for stopping Monzo from writing a letter to the judge explaining his presence at the victim's house which was used at trial to impeach him. Monzo himself chose to write that letter.

Coleman v. DeWitt
2002 WL 377008 (6th Cir. 3/12/02)

In May, 1997, Coleman entered a plea of *nolo contendre* to involuntary manslaughter and felonious assault. He had kicked Olivia Williams in the stomach while battering her. As a result, Ms. Williams suffered a miscarriage. Coleman argues that the involuntary manslaughter conviction violates his 14th amendment due process rights under *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny because the Ohio manslaughter statute did not require proof of the miscarried fetus' viability for conviction. He further argues that his 9 year sentence for involuntary manslaughter is cruel and unusual punishment. The 6th Circuit rejects his arguments and affirms the denial of a writ of habeas corpus.

Statute Making Termination of Another's Pregnancy a Crime is Constitutional Despite no Requirement of Proof of Viability of Terminated Fetus

The Ohio involuntary manslaughter statute reads as follows: "No person shall cause the death of another or the unlawful termination of another's pregnancy as a proximate result of the offender's committing or attempting to commit a misdemeanor of any degree." Coleman argues that because the involuntary manslaughter statute does not require the state to prove viability of the terminated fetus, the statute is beyond the state's prescriptive power under *Roe* and is therefore unconstitutional. The Court first notes that "the 'essential holding of *Roe*' is a 'recognition of the *right of the woman to choose* to have an abortion before viability and to obtain it without undue influence from the state." *quoting Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992). The Court was not holding, as Coleman argues, that state has no interest in protecting the life of the unborn; "quite to the contrary, the Court in *Roe* recognized that the state had important interests in protecting fetal life."

While a woman's substantive due process right to decide the outcome of her pregnancy is compelling, and thus triggers strict scrutiny of any statute limiting the interest, "Ohio's interest in the protection of fetal like need not be compelling, however, to justify the application of the Ohio involuntary

manslaughter statute to Coleman's actions. Punishing Coleman's actions in no way implicates a *woman's* right to determine the disposition of *her* pregnancy recognized in *Roe* and its progeny. . . It is Williams, the pregnant woman, who holds the limited right to terminate her pregnancy before viability, and Coleman may not invoke it on her behalf."

No Overbreadth Violation in Involuntary Manslaughter Statute Either

The Court also rejects Coleman's argument that the statute is unconstitutionally overbroad in that, in addition to conduct like Coleman's, it also proscribes constitutionally protected conduct. First, the overbreadth doctrine is inapplicable when the 1st amendment is not implicated. *U.S. v. Salerno*, 481 U.S. 739, 745 (1987). Second, even if overbreadth analysis could occur, the statute does not apply to any protected conduct. The statute prohibits "the unlawful termination of another's pregnancy as a proximate result of the offender's committing . . . a misdemeanor." Action would have to be unlawful and caused by the commission of a misdemeanor. No Ohio law makes a woman's procuring of an abortion a misdemeanor, and any abortion would be consensual, and thus not unlawful. This "statute seems well-tailored to target activity, like Coleman's, that interferes with the woman's right to continue, or under certain limited circumstances to terminate, her pregnancy."

9-Year Sentence for Involuntary Manslaughter Is Not "Grossly Disproportionate to Crime"

Finally, the Court holds that the proscription against cruel and unusual punishment was not violated in the case at bar. The 8th amendment only forbids sentences that are "grossly disproportionate to the crime." *Harmelin v. Michigan*, 501 U.S. 957, 995 (1991). "Coleman's sentence of nine years for involuntary manslaughter is far from the 'gross disproportionality' required to offend the 8th Amendment. Coleman's actions were violent and deprived Williams of her child, or at least the ability to exercise her rights over her pregnancy."

French v. Jones
2002 WL 360660 (6th Cir. 3/8/02)

This is a very important case and is before the 6th Circuit for the second time. At the first appeal, the Court vacated the district court's order granting habeas relief and remanded the case to the district court for an evidentiary hearing to determine whether one of the defendant's "attorneys," Ty Jones, was indeed an attorney. On remand, the district court found that he was not an attorney and thus granted habeas relief on the grounds that French was denied counsel at a critical stage of the proceedings when the trial court gave a supplemental instruction to the deadlocked jury with no counsel present for the defendant. The 6th Circuit affirms, also holding that a defendant's lawyer must be present when a judge gives a supplemental instruction to a deadlocked jury.

Defendant Denied Counsel at Critical Stage of Proceedings Where No Attorney Is Present When Court Gives Supplemental Jury Instruction to Deadlocked Jury

Mr. French was found guilty but mentally ill in the shooting deaths and assaults of 4 fellow union officials. He was sentenced to life without parole. At trial, 3 "attorneys" were seated at counsel table: Cornelius Pitts, Monsey Wilson, and Ty Jones. At the beginning of trial, Pitts introduced Jones to the court as an attorney from California who specializes in jury selection. Pitts said that Jones was there to assist in the defense so the trial court allowed Jones to remain at counsel table. Pitts introduced Jones to the jury as "counsel from California." Jones remained at counsel table throughout the trial, but never spoke in the presence of the jury.

At the evidentiary hearing it was revealed that Jones was not a lawyer but rather was a motion picture consultant and screenwriter who had attended only a year of law school at NYU. Jones was observing the trial as background for development of a TV show based on the Detroit legal system. Pitts testified at the evidentiary hearing that he thought Jones was a lawyer, but that he never actually intended to have Jones participate in the defense of French. Rather he wanted him at counsel table to "give the impression of a large defense team."

The trial took 2 weeks. The jury began deliberating on Friday, April 28, 1995. That afternoon the jury sent a note to the judge. The judge did not respond to the note but recessed the jury for the weekend. On Monday morning, the trial judge disclosed the contents of the note to the defense and prosecution. It stated, "We can't reach a unanimous decision. Our minds are set." Pitts requested a mistrial. The court overruled that motion and read the jury the standard Michigan deadlocked jury instruction. Later Monday afternoon, the jury sent out another note stating that they could not reach a verdict. The judge recessed the jury for the day.

On Tuesday morning, the trial court again instructed the jury and directed them to continue deliberations. At 11:00 a.m., the jury sent out a third note stating, " We are not able to reach a verdict. We are *not* going to reach a verdict." The judge sent the jury to lunch, instructing them to return at 2:00 p.m. At 2:00 p.m., neither Pitts nor Wilson had returned. The court instructed Jones to try and find them, but he could not. At 2:07 p.m., the judge, without Pitts or Wilson present, gave the jury a supplemental jury instruction. This was not the standard deadlocked jury instruction that had been given before but was instead a jury instruction that stated the following in part: "Based upon your oath that you would reach a true and just verdict, we expect you will communicate. As I stated before, exchange ideas. Give your views. Give your opinions and try to come to a verdict, it at all possible. But if you don't communicate, you know that you can't reach a verdict. And when you took the oath, that was one of the

Continued on page 36

Continued from page 35
promises that you made by raising your hand taking the oath, that you would deliberate upon a verdict, to try and reach a verdict. And we told you at the outset it would not be an easy task, but we know you can rise to the occasion." One hour after giving the instruction, the judge dismissed the jury for the day.

The next morning, Pitts moved for a mistrial, arguing that the supplemental instruction was coercive. As he was arguing, the jury returned with its verdict. The Michigan state courts denied relief on this issue.

It is undisputed that "the complete denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice." *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000). A supplemental jury instruction is a "critical stage" of a trial. *Rogers v. U.S.*, 422 U.S. 35 (1975). The absence of counsel during a critical stage of trial is *per se* reversible error. *U.S. v. Cronic*, 466 U.S. 648, 666 (1984). "The existence of [structural] defects—deprivation of the right to counsel, for example—requires automatic reversal of the conviction because they infect the entire trial process." *Brecht v. Abrahamson*, 507 U.S. 619, 629-630 (1993).

Instructions to Deadlocked Jury Should Not be Coercive and Ideally Should Follow ABA Model Instruction 5.4

The 6th Circuit also notes that the trial court's supplemental instruction was inappropriate "and likely had a substantial and injurious influence on the jury's verdict." The trial court should have continued to use the Michigan standard jury instruction, which was based on ABA standard jury instruction 5.4. This instruction specifically "minimize[s] any coercive effect of jury instructions." In particular the model jury instruction reminds jurors "they should not give up their honest convictions solely because of the opinion of the other jurors or in order to reach a verdict." The Court notes that the giving of this supplemental instruction is especially troubling because it was the third such instruction given and it varied dramatically from the initial instructions. The omission of the "honest convictions" language "risks the jurors believing their responsibilities have changed." Furthermore this omission "was amplified by the trial judge telling the jurors three separate times they took an oath to reach a verdict." Finally, "the time line of the jury's deliberation suggests that the third supplemental instruction had an effect." Only after receiving the third jury instruction with its harsh language was the jury able to reach a verdict.

U.S. v. Aparco-Centeno
280 F.3d 1084 (6th Cir. 2/14/02)

Proof of Prior Convictions Will Remain a "Sentencing Factor," Not an Element of the Crime, Until the U.S. Supreme Court Says Otherwise

This case is only important for our purposes so far as it emphasizes that until the U.S. Supreme Court decides to the contrary, the 6th Circuit will continue to interpret *Apprendi v. New Jersey*, 530 U.S. 466 (2000), as not requiring proof of a prior conviction beyond a reasonable doubt as an element of the crime. The U.S. Supreme Court in *Apprendi* declined to overrule *Almendarez-Torres v. U.S.*, 523 U.S. 224 (1995), an earlier case that characterized the determination of a prior "aggravated felony" as a sentencing factor, so the 6th Circuit cannot.

U.S. v. Orlando and Daniels
281 F.3d 586 (6th Cir. 2/25/02)

This case involves charges of prostitution and money laundering in connection with the operation of a business called "Dawn's Whirlpool and Massage." The majority of the opinion deals with various federal law issues that are not of concern to the state court practitioner. All this summary will address are the allegations involving jury irregularities.

New Trial Not Required Despite Numerous Allegations of Improper Influence on Jury and Jury Irregularities

The day after the verdict was returned, one of the jurors, Kimberly Wade, contacted defendant Orlando and informed him of various instances of jury misconduct, including the possibility that the verdict obtained against Orlando was not unanimous and that some of the jurors read the newspaper while deliberating. Orlando promptly filed a motion for a post-verdict hearing. A hearing occurred, and Wade appeared for questioning. Her testimony focused on nine instances of extraneous jury influences: (1) newspapers containing articles about the case that were brought into the jury room; (2) discussion of a business located next to Dawn's called "The Chamber" where sadomasochistic sexual acts occurred; (3) police statements that were related to the jury by jury foreperson Joseph Martin, including that several officers told him that clients at Dawn's received more than massages; (4) a TV program called "Sin City" that was watched by several jurors; (5) a jury administrator's comment that a verdict was preferable to a hung jury; (6) relationships between several jurors and a Dr. Richard Feldman, who was involved in the investigation of Dawn's; (7) visits to *The Tennessean* newspaper website; (8) foreperson Martin's statements regarding the defense trial strategy and mistrial requests made during times when the jury was not present; and (9) Martin's comments regarding evidence not presented at trial, including names of Dawn's clients and the fact that Orlando was under house arrest. A *Remmer* hearing, *Remmer v. U.S.*, 347 U.S. 227 (1954), occurred where the court heard testimony from all of the jurors, from 3 alternates, and from Martin's wife. The district court denied the motion for a new trial, holding that Ms. Wade's "allegations either lack credibility; or that no prejudice to Defendants resulted from juror exposure to extraneous information."

Actual Bias as a Result of Extraneous Jury Influence Must be Shown to Warrant a New Trial

The 6th Circuit holds that the trial court did not abuse its discretion in denying the new trial motion. A thorough *Remmer* hearing occurred. The court within its discretion in holding that Wade lacked credibility and even where there was corroboration of her claims, the defendants failed to show actual bias. The Court declines to adopt the 11th Circuit's standard in reviewing *Remmer* claims. The 11th Circuit employs a standard that only a "reasonable possibility" of juror bias exists in order to obtain a new trial. *U.S. v. Bollinger*, 837 F.2d 436, 439 (11th Cir. 1988). The 6th Circuit holds that absent a U.S. Supreme Court opinion or an *en banc* opinion lowering the standard, the Court will not disturb precedent.

U.S. v. Barnes
278 F.3d 644 (6th Cir. 1/30/02)

Government Must Adhere to Plea Agreement

This case is a victory for defendants. The 6th Circuit reverses Barnes' conviction and sentence because the government violated the terms of the plea agreement by not expressly requesting that the court sentence Barnes at the lower end of the sentencing guidelines. This reversal occurs despite the fact that plain error analysis occurred because of the defendant's failure to object.

At the plea hearing, the government expressly agreed to recommend a sentence at the low end of the guidelines. The plea agreement was read aloud at the plea hearing, and the court acknowledged that the government recommended a low end sentence and Barnes acknowledged that the court was not bound by the recommendation. At sentencing, however, the government failed to recommend a low-end sentence.

Irrelevant If Trial Court Says It Would Not Be Influenced by Recommendation - Violation Has Still Occurred

In *Cohen v. U.S.*, 593 F.2d 766, 771-772 (6th Cir. 1979), the 6th Circuit, relying on *Santobello v. New York*, 404 U.S. 257 (1971), stated that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." The Court noted that it does not matter that the sentencing judge states that he or she would not be influenced by the prosecutor's recommendation. "The fault here rests on the prosecutor, not on the sentencing judge."

Preservation Not Required Because Defendant Is Waiving Constitutional Rights

Plain error analysis does not effect the application of *Cohen*. "[W]hen a defendant pleads guilty in reliance on a plea agreement, he waives certain fundamental constitutional rights such as the right to trial by jury. Because a defendant is foregoing these precious constitutional guarantees when entering into a plea agreement with the government, it is essential that 'fairness' on the part of the prosecutor is presupposed. In this context, 'fundamental fairness' means that the courts will enforce promises made during the plea bargaining process that induce a criminal defendant to waive his constitutional rights and plead guilty." (citations omitted) The Court also notes that the fact that the court may have been aware of the government recommendation or have the plea agreement before it is irrelevant. Mr. Barnes' sentence is vacated and remanded for re-sentencing before a different judge.

Judge Suhrheinrich Dissent - No Violation Because of Lack of Objection

Judge Suhrheinrich dissents because he does not find plain error. While he believes there was error in that the government failed to recommend at sentencing that Barnes be sentenced at the low end of the guidelines, he does not believe that it was an error affecting substantial rights or seriously affecting the fairness of the judicial proceedings. Suhrheinrich specifically notes that the sentencing judge was made aware of the government's recommendation at the plea hearing. The judge also had the plea agreement before her at final sentencing.

U.S. v. Lucas
282 F.3d 414 (6th Cir. 2/28/02)

This case is another win. The Court vacates a firearm enhancement because of insufficient evidence. Anyone who deals with drug cases on a regular basis should familiarize himself or herself with this case. Lucas plead guilty to attempt to distribute cocaine base and conspiracy to commit that offense. Lucas had asked a friend, Brian Horton, to drive from Chicago, Illinois, to Lucas' home in Louisville, and to bring him a package, which Lucas would arrange to be delivered to Horton. Horton agreed. On Horton's way to Louisville, he was stopped for speeding in Indiana. He agreed to a search of his car. The police discovered the package Lucas had arranged for Horton to transport, and in that bag was 595.8 grams of crack cocaine.

Horton agreed to cooperate with police. Horton continued to Louisville, and when he arrived he drove to a shopping center parking lot. A tire on his car was flattened. Horton called Lucas and asked him to bring a jack. Lucas agreed. He brought along a friend. When he arrived, the police arrested him. After his arrest, police searched the car that Lucas had driven to the parking lot. They found a loaded .38-caliber firearm in the glove compartment. Lucas' sentence was enhanced as a result of the firearm, although no evidence was presented as to the ownership of the gun or of the vehicle, and no fingerprints were lifted from the gun.

Firearm Enhancement Vacated Where No Proof that Defendant Owned Gun or the Car that the Gun was Found In, Or Even Knew Gun was in the Car

The 6th Circuit reverses and remands Lucas' case for re-sentencing because of the firearm enhancement. For a firearm enhancement, the government must prove that the defendant (1) actually or constructively possessed the gun (2)

Continued on page 38

Continued from page 37

during the commission of the offense. (The requirements for KRS 218A.992, Kentucky's firearm enhancement statute, are very similar.) The Court holds that the government presented no evidence at sentencing that Lucas owned the gun or the car or knew the gun was in the glove compartment. The gun was not used or displayed during the commission of the offense. No fingerprints were lifted from the gun. Another individual occupied the vehicle. The case is distinguishable from *U.S. v. Paulk*, 917 F.2d 879 (5th Cir. 1990). In that case defendant was arrested away from his car and an unloaded, inoperable gun was found in the glove compartment. Paulk, however, admitted ownership of the gun.

Because of the lack of evidence that Lucas possessed, actually or constructively, the firearm, the district court's determination to the contrary was clearly erroneous. This case is very unusual, considering the 6th Circuit's prior holdings in firearm enhancement cases. The Court seems to be demanding that prosecutors at least put on some proof of possession before enhancement can occur.

Dissent by Siler

Judge Siler dissents. He argues that "possession not only may be constructive, but a defendant need not have exclusive possession of property to be found in possession of it. Joint possession will suffice." He notes that affirmance of the firearm enhancement would be appropriate under the "fortress theory." *U.S. v. Critton*, 43 F.3d 1089, 1096-1097 (6th Cir. 1995).

U.S. v. Haywood
280 F.3d 715 (6th Cir. 2/21/02)

Another strong case for our clients! Haywood was convicted of possession with intent to distribute 18 grams of crack cocaine on the date of August 1, 1997. To prove that he intended to distribute the drugs he possessed on August 1, 1997, the government offered proof that Haywood was subsequently arrested on December 21, 1997, for possessing 1.3 grams of crack cocaine. Haywood objected to the admission of this evidence, arguing it was irrelevant and unfairly prejudicial, but the trial court overruled the objection. The 6th Circuit reverses and remands for a new trial.

The August 1997 offense occurred as a result of a controlled buy by FBI informant Spears. The FBI orchestrated the buy as part of an investigation into illegal drug sales by Michael Liles, a friend of Haywood. Spears approached Haywood about purchasing some crack. Haywood told Spears to come to a specified apartment at South Scott Street in Lima, Ohio. Both Haywood and Liles were present during the drug buy. At trial, Spears testified that Haywood sold him the crack. Liles, however, testified that he sold Spears the drugs and FBI agent Spicocchi corroborated this testimony by testifying that Spears initially told the FBI that Liles sold him the crack.

In an effort to boost its position that Haywood sold Spears the drugs on August 1, the government introduced testimony, over defense objection, of Lima police officers that they found drugs on Haywood on December 1, 1997.

FRE 404(b) analysis, like KRE 404(b) analysis, requires that a trial court faced with other bad acts evidence perform a three-step analysis before allowing evidence of the other bad act to come in. First, there must be evidence that the other act occurred. In the case at bar, Haywood concedes that he possessed crack on December 1, 1997 so this prong is not at issue. Second, the court must decide whether the other act is probative of a material issue other than character. Finally, the prejudicial effect of the evidence cannot substantially outweigh the probative value.

Evidence of Subsequent Possession of Crack Not Probative of Intent to Distribute Crack 5 Months Earlier: Not "Substantially Similar and Reasonably Near in Time"

The 6th Circuit first holds that evidence of the December 1st crack possession was not probative of a material issue. The evidence was offered for an admissible purpose, intent to distribute crack cocaine. Furthermore, intent was "in issue" during Haywood's trial. However, the inquiry is narrower than that. The issue is whether the evidence of Haywood's December 1997 possession is probative of intent to distribute crack cocaine on August 1, 1997. Does the evidence relate to conduct that is "substantially similar and reasonably near in time" to the specific intent offense at issue? *U.S. v. Blankenship*, 775 F.2d 735, 739 (6th Cir. 1985). The Court first decides that possession of a small amount of crack cocaine for personal use on December 1st is not substantially similar to the offense of possession of crack cocaine with the intent to distribute five months earlier. In so holding, the Court declines to join with the 5th, 8th, and 11th Circuits, and instead adopts the approach of the 7th and 9th Circuits. The Court notes that the government failed to offer testimony that 1.3 grams is an amount inconsistent with personal use, nor was there any circumstantial evidence that would support the conclusion that Haywood intended to distribute the crack cocaine. Haywood had not divided the crack cocaine into individual allotments for sale. He did not possess a large amount of cash or a firearm either. Absent evidence that Haywood intended to distribute the 1.3 grams of crack cocaine, the December 1997 crack cocaine possession had no bearing on whether he intended to distribute the crack cocaine in his possession on August 1, 1997.

Evidence of Later Crack Possession Also More Prejudicial than Probative

The Court further holds that even if the December 1997 offense were substantially similar to the August 1997 offense, evidence of the subsequent offense would be more prejudicial than probative. First, the evidence of the 1997 possession had a "powerful and prejudicial impact." It "brand[ed] Haywood as a criminal possessing crack cocaine" and "further invited the jury to conclude that Haywood 'is a bad person. . . and that if he 'did it [once] he probably did it

again.'" *U.S. v. Johnson*, 27 F.3d. 1186, 1193. (6th Cir. 1994). Second, there was other evidence regarding Haywood's intent. It had Spears' testimony as well as the fact that the amount possessed on August 1, 1997, 18 grams of crack cocaine, is consistent with trafficking.

Admonition Often Not Enough When Bad Evidence Has Already Been Introduced

The fact that a limiting instruction was given is not enough. "A limiting instruction will minimize to some degree the prejudicial nature of evidence of other criminal acts; it is not, however, a sure-fire panacea for the prejudice resulting from the needless admission of such evidence."

Not only was the admission of the December, 1997, crack cocaine possession incident an abuse of discretion, it was so prejudicial that Haywood's conviction and sentence must be reversed. "Haywood's guilt was significantly contested in the present case." While there was testimony from Spears that Haywood sold him the crack, there was conflicting evidence from Liles that he sold Spears the drugs. Notably, an FBI agent testified that Spears initially told the FBI immediately after the buy that Liles sold him the crack. Because of the lack of overwhelming evidence, admission of the December 1997 possession was not harmless.

Dissent by 8th Circuit Judge Sitting by Designation

Judge Gibson (Senior Judge from the 8th Circuit sitting by designation) dissents. He first notes that the crack found on Haywood in December was no small amount and is not so dissimilar to be inadmissible under 404(b). Furthermore, he argues that the fact that the drugs on both occasions were crack is important. "Evidence that a defendant carries a certain kind of drug with him suggests a degree of involvement in the trade that tends to support an inference of intent to distribute that drug at another time." ■

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CAPITAL CASE REVIEW

***Woodall v. Commonwealth*, Ky., 63 S.W.3d 104 (2001)**

Majority: Wintersheimer (writing), Lambert, Cooper, Graves, Johnstone
Minority: Stumbo (writing), Keller (in part)

Robert Keith Woodall pled guilty to capital murder, capital kidnapping and rape. A jury sentenced him to death for murder, and to life for the kidnapping and rape.

NO ADVERSE INFERENCE

The Kentucky Supreme Court held that the trial court correctly refused Woodall's request that the jury be given an instruction to take "no adverse inference" from his decision not to testify at the penalty phase.[1] Woodall pled guilty to the crimes; he had no presumption of innocence. For the same reasons, *Mitchell v. United States*, 526 U.S. 314 (1999) is inapplicable. *Estelle v. Smith*, 451 U.S. 101 (1981), did not extend *Carter* to the penalty phase of a capital trial. *Woodall*, 63 S.W.3d at 115.

The Court appears at least to implicitly recognize that a *Carter* instruction is necessary when a defendant does not testify at the penalty phase of a capital trial in which he has not pled guilty.

***BATSON* ISSUE**

The prosecutor did not strike the only remaining African-American juror on a pretext.[2] "An attitude of mistrust expressed on a jury questionnaire" should be given the same weight as that of mistrust or bias expressed in voir dire. *Id*., at 120.

PRESENTENCE SEX OFFENDER TREATMENT PROGRAM EVALUATION

KRS 532.050(4)(1) does not preclude a presentence sex offender treatment program evaluation when the crimes occurred in a case in which the death penalty is sought. There was no evidence that the trial court used any statement Woodall made during the evaluation in his judicial sentencing decision. *Id*., at 121-122.

PROSECUTOR'S CLOSING ARGUMENT

Reiterating its proclamation that juries are free to consider a defendant's future dangerousness, the Court found no error in the prosecutor's penalty phase closing statement, "'When does it end?'" *Id*., at 125, citing *Hodge v. Commonwealth*, Ky., 17 S.W.2d 824 (2000).

KCPC EVALUATION

After Woodall gave notice of his possible use of evidence of mental retardation in mitigation, the trial court correctly ordered an evaluation by KCPC. Nothing in KRS 504.070 states such an exam must be undertaken only after a defendant has given notice of his intent to introduce evidence of mental illness or insanity, or that the evidence must relate to guilt and not punishment. *Id*.,. at 127. *Continued on page 40*

Continued from page 39

HEARSAY

Woodall claimed defense psychologist Phillip Johnson's testimony that Woodall had failed to complete the sex offender treatment program during a prior prison sentence was inadmissible hearsay not admissible under any KRE 802 exception. The statement was admissible under KRE 703 because it tended to show the basis of Johnson's opinion that Woodall was mentally ill. *Id*., at 127-128.

OTHER ISSUES

The Court also considered issues on the restriction of voir dire, "for cause" strikes, instructions, denial of a continuance, crime scene photographs, number of peremptory challenges, Woodall's guilty plea, witness issues and arguments relating to the death penalty, but broke no new legal ground.

***Hodge v. Commonwealth* and**
Epperson v. Commonwealth,
— S.W.3d — (rendered September 27, 2001)
(modified March 21, 2002)

Majority: Johnstone (writing), Lambert, Cooper, Keller
Minority: Wintersheimer (writing), Graves
Stumbo not sitting

The Supreme Court remanded the Letcher County convictions of Roger Epperson and Benny Hodge for a post-conviction evidentiary hearing. Epperson and Hodge v. Commonwealth, Ky., — S.W.3d — (2001).

JURY TAMPERING

Both men alleged numerous issues related to jury tampering, including visits by the prosecutor, provision of alcoholic beverages and a decision as to the foreman of the jury, guilt and punishment on the first night of sequestration.

In their motions, Epperson and Hodge had alleged jury tampering but had not included the bases for the various charges. The Court found that the allegations had been pled sufficiently: rather than a blanket allegation, both men had spelled out specific incidents, such as the Commonwealth's Attorney's daily *ex parte* contact with the jurors and that jurors had been provided with alcohol, newspapers and personal visits during their supposed sequestration. The Court restated the correct procedure for examining an RCr 11.42 action: the trial court must focus on whether the post-conviction motion raises "an issue of fact that cannot be determined on the face of the record." *Id*., slip op. at 4, quoting *Lay v. Commonwealth*, Ky., 506 S.W.2d 507, 508 (1974) and *Stanford v. Commonwealth*, Ky., 854 S.W.2d 742, 743-44 (1993).

Epperson and Hodge's allegations of jury tampering rose to that level. Furthermore, jury tampering in a criminal trial is presumed to be prejudicial. *Id*., citing *Remmer v. United States*, 347 U.S. 227, 229 (1954). Epperson and Hodge alleged facts more grave than those in *Remmer*.

INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE

Counsel for neither Epperson nor Hodge presented witnesses at the penalty phase, but made stipulations pertinent to each man. *Id*., at 5-6.

The Supreme Court agreed with the trial court that defense counsel has no duty to present any or all evidence, but found that the trial court had used the incorrect procedure in its opinion. The Court laid out a three-part analysis: 1) determine whether a "reasonable investigation" would have uncovered mitigating evidence; 2) determine whether defense counsel made a tactical decision not to present the evidence; 3) should the choice be found not tactical and that counsel's performance was deficient, then the court must determine whether there is a reasonable probability that the outcome would not have been different. *Id*., at 8, quoting *Porter v. Singletary*, 14 F.3d 554, 557 (11th Cir. 1994).

It "appear[ed]" that a mitigation investigation had not been done, but the Court left for an evidentiary hearing whether this allegation could be borne out. The Court instructed trial courts (and counsel) that "[b]efore any possible mitigating evidence can be weighed in a meaningful manner, that evidence first must be determined and delineated." *Id*., at 9. The Court appears to indicate that post-conviction counsel must be prepared to present facts in the post-conviction motion and witnesses at the evidentiary hearing demonstrating the penalty phase which could or should have been put on at trial.

The Court did not address other claims presented in the RCr 11.42 motions regarding snitch and co-defendant issues and conflicts of interest on the part of both Hodge and Epperson's defense counsel.

Ronnie Bowling v. Commonwealth,
— S.W.3d — (rendered March 21, 2002)

Majority: Johnstone (writing), Cooper, Graves, Keller, Wintersheimer
Stumbo, without opinion, concurs in result only
Lambert, not sitting

The Court reiterates its RCr 11.42 mandate that proof of claims in post-conviction consist not of a bare allegation contained in a post-conviction pleading but something more tangible. *See Epperson, supra*. Also, although the Court stated in *T.C. Bowling et al*., Ky., 926 S.W.2d 667 (1996), that an ability to amend could be liberally given, in this post-*Bowling* action, the Court shows little patience with an incomplete investigation at the time an RCr 11.42 action is filed despite the severity of a capital case and the rush to file the RCr 11.42 to premature stay of a warrant of execution. *See Ronnie Bowling v. Commonwealth*, slip op. at 23.

***BRADY* VIOLATION**

A federal district judge's statement that he was sentencing Chappell to the minimum "under the situation we have here,"

was not conclusive evidence that Chappell received a benefit for his state testimony. Defense counsel cross-examined Chappell about his federal charges and could have obtained his federal sentencing transcript to discover if, indeed, a benefit had been conferred. *Bowling v. Commonwealth*, slip op. at 3.

Bowling did not prove the claim that the prosecutor performing a background search such as that normally performed on witnesses would have turned up Chappell's pending Fayette County felony charges or that the prosecutor in Bowling had actual knowledge of those charges. *Id*. It appears the Court desired that a criminal history search done on Chappell be attached as part of an appendix to the post-conviction pleading, again that tangible "something."

Bowling also did not prove his allegation that the prosecutor in Laurel County had requested leniency for Chappell from the Fayette County prosecutor. Again, the Court had nothing tangible as proof that such errors occurred.

INEFFECTIVE ASSISTANCE OF COUNSEL

Bowling alleged nine ineffective assistance of counsel claims, none of which met the *Strickland v. Washington*, 466 U.S. 668 (1984), standard.

Counsel was not ineffective for failing to call Jones as a witness to impeach Chappell. Calling Jones would only have resulted in a swearing contest between two felons. *Id*., at 7.

An FBI analyst matched bullets and bullet fragments to each of the two crime scenes and to those found in Bowling's box of ammunition. Bowling's issues regarding counsel's ineffectiveness for failing to ensure testing by a defense expert and to ask for a continuance so that such testing might be completed appear to attempt to circumvent the real issue of the admissibility of the FBI expert's testimony. *Id*,. at 15.

RECUSAL OF THE TRIAL JUDGE

Bowling argued that the trial judge was a material witness; again, the Court found insufficient evidence in the record to support this claim. *Id*., at 21.

DISQUALIFICATION OF COMMONWEALTH'S ATTORNEY

Bowling's pre-hearing motion to disqualify Commonwealth's Attorney Handy was denied. Handy then became a witness at the hearing. Although he should have disqualified himself, no prejudice resulted from his failure to do so. A "seasoned and able judge" was the trier of fact who would not have been unduly influenced by the prosecutor acting as both party to the action and witness. *Id*., at 21-22.

The Court also considered issues of interviewing witnesses, prior bad acts, the excusal or a juror, instructions, penalty phase ineffective assistance and alleged ineffective assistance of appellate counsel, but made no novel legal statements.

Tamme v. Commonwealth,
— S.W.2d — (rendered March 21, 2002)

Majority: Wintersheimer, Cooper, Graves, Johnstone
Keller (writing), Lambert (concurrence)
Stumbo (concurrence in result only)

The Court reversed the grant of Tamme's motions pursuant to RCr 10.02/10.06 and RCr 11.42 and remanded for further hearings on the remainder of the RCr 11.42 issues.

LAW OF THE CASE

Tamme was tried for the 1983 slayings of two employees in a marijuana farming operation and sentenced to death for both murders. On appeal, the Court ruled in *Tamme v. Commonwealth I*, Ky., 759 S.W.2d 51 (1988) that Tamme should be retried in a proceeding where illegal drug farming was not mentioned. At Tamme's second trial, defense counsel did not use that evidence in cross-examining the witnesses against Tamme. The trial court's decision that counsel was ineffective was incorrect. The only "reasonable and legally correct interpretation of *Tamme I* is that [introduction of] evidence regarding the marijuana farming was not to be allowed" by either party. *Tamme III*, slip op. at 4.

The Court continues to reiterate that issues which either were raised and decided or could have been raised on direct appeal cannot again be relitigated in RCr 11.42 proceedings. The issue regarding introduction of the farming evidence was raised and decided on direct appeal and cannot be relitigated. *Tamme III*, *id*.

The Court holds that doctrine of law of the case applies. The decision in *Tamme I* was final and binding on the parties, trial and appellate courts. That doctrine promotes the adjudication of all claims in one proceeding, rather than one claim in each of many proceedings. Such is the case here.

Further, counsel was not ineffective in failing to use the testimony in cross-examination. *Tamme I* held that either party could not use the information. An argument that the prosecution could not use the information but that the defense could as impeachment "is absurd." *Id*.

Even had the information been available in such a form, defense counsels' performance was reasonable. The strategy was to present an alibi and to portray Tamme as a solid citizen, not to portray him as a person involved in the farming of an illegal drug. Moreover, Tamme did not prove that he was prejudiced by such a decision. Again, there was no proof that had the evidence been presented, Tamme would not have been convicted a second time. *Id*., at 8.

LEGAL STANDARD IN DECIDING MOTIONS FOR NEW TRIAL

In his pleading, Tamme offered an affidavit of a newly discovered witness, Armstrong, whose information could have

Continued on page 42

Continued from page 41
helped to impeach the testimony of Buchanan, Tamme's co-defendant who had turned state's evidence. In finding that the evidence should have been presented at trial, the trial court used the incorrect legal standard and then mixed standards for deciding RCr 10.02/10.06 and RCr 11.42 motions.

The trial court indicated that the test for RCr 10.02/10/06 motions is whether the testimony of the newly discovered witness "could reasonably result in a different verdict and whether the testimony could be reasonably persuasive as a part of the entire defense theory." *Tamme III*, slip op. at 5. The correct standard is whether the testimony would "with reasonable certainty" change the verdict or "probably change the result" in a new trial. *Id*., citing *Collins v. Commonwealth*, Ky., 951 S.W.2d 569 (1997).

Regarding the trial court's second error, the Court found no precedent for the mixing of standards for deciding RCr 10.02/10.06 and RCr 11.42 motions. The trial court itself admitted that the newly discovered evidence, when not considered in conjunction with ineffective assistance of counsel, would not meet the standard for granting a new trial.

KELLER CONCURRENCE

Justice Keller, joined by Chief Justice Lambert, agreed that the trial court erred and with the Court's analysis regarding mixed standards. He agreed with the majority that Tamme did not meet his burden of proof under *Strickland v. Washington*, 466 U.S. 864 (1984), wrote separately regarding the *Tamme I* issue because of his belief that the majority improperly applied the law of the case doctrine.

The paragraph from *Tamme I*, found at 52-54, which the majority apparently used to come to its conclusion did not address the question of whether the evidence was admissible for all purposes, including whether Tamme could use the information as impeachment. In other words, the use of such information as impeachment was left open. Application of the law of the case doctrine must rest on more than mere speculation. "Simply put, the law of the case doctrine is not applicable when a subsequent trial presents different facts, issues, or evidence." *Id*., citing 5 Am. Jur. 2d Appellate Review §611 (1995).

ENDNOTES

1. *Carter v. Kentucky*, 450 U.S. 288 (1981)
2. One of her answers on the jury questionnaire was that "she did not trust anyone." ■

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The 100th Wrongfully Convicted Inmate is Free After Ten Years, Escaping the Death Penalty: The Constitution Project Urges Death Penalty Reforms Now

On Monday, Ray Krone walked out of an Arizona prison not only exonerated of the murder charges against him, but with DNA evidence pointing almost certainly to another person. He becomes the 100th death row inmate to be exonerated since the death penalty was reinstated in 1973.

Mandatory Justice: Eighteen Reforms to the Death Penalty was developed by the Constitution Project's blue-ribbon, bipartisan committee that is the first nationwide group to achieve consensus on comprehensive death penalty reforms.

One of the recommendations in Mandatory Justice speaks directly to the 'preservation and use of DNA evidence to establish innocence or avoid unjust execution. In most jurisdictions, the legal structure is not adequate to take proper advantage of the advances in scientific testing of evidence.'

The Committee recommends that legislation dictate the preservation of biological samples in all death penalty cases and should require testing upon defense request. In many instances the lack of legislation has resulted in destruction of crucial evidence.

There is also urgent need for the guarantee for effective defense lawyers, prohibition of the execution of defendants who were juveniles at the time of the crime and the mentally retarded, expansion of the possibilities for life without parole, safeguards to assure racial fairness, and better definition of the role of judges, juries and prosecutors.

The Committee includes proponents and opponents of the death penalty; victim advocates; prosecuting and defense lawyers; prison officials; judges and scholars. The committee's co-chairs are Beth Wilkinson, the prosecutor in the Oklahoma City bombing case; the Honorable Charles F. Baird, former Judge, Court of Criminal Appeals of the State of Texas; and the Honorable Gerald Kogan, former Chief Justice, Supreme Court of the State of Florida and former Chief Prosecutor, Homicide and Capital Crimes Division, Dade County, Florida.

Constitution Project Executive Director Virginia Sloan, says, "One-hundred people are proof that the system is not working. It's time for Americans to demand reform in the name of accuracy, fairness and justice. No matter whether we support or oppose capital punishment, we cannot allow the system to make another mistake." ■

Case Law Review: Juvenile Confessions/Right Against Self-Incrimination

Rebecca DiLoreto

U.S. Supreme Court

Application of Gault,
387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967).
Neither Fourteenth Amendment nor Bill of Rights is for adults alone. The privilege against self-incrimination protects juveniles adjudicated in juvenile court just as it protects adults. If counsel is not present, for some permissible reason, when admission is obtained from juvenile, greatest care must be taken to assure that admission was voluntary, in sense not only that it has not been coerced or suggested, but also that it is not product of ignorance of rights or of adolescent fantasy, fright or despair.

Gallegos v. Colorado,
370 U.S. 49, 82 S.Ct. 1209, 8 L.Ed.2d 325 (1962).
Confession state officers obtained from 14-year-old boy, who had been held five days without officers sending for his parents or seeing that he had advice of lawyer or adult friend, and without their bringing him immediately before judge, was obtained in violation of due process, although boy had made earlier confessions.

Haley v. Ohio,
332 U.S. 596, 68 S.Ct. 302, 92 L.Ed. 224 (1948).
Interrogation of boy of 15 violated due process. Child not given access to friends or family. Child denied access to attorney that Mom sent to the police station. "When as here, a mere child-an easy victim of the law-is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces." *Id*. 68 S.Ct. at 304.

U.S. Circuit Courts

U.S. v. Doe, 226 F.3d 672 (6th Cir. 2000).
Circumstances of **juvenile's confession** bore sufficient indicia of voluntariness to warrant its admission. There was strong evidence that Doe was advised of his Miranda rights, knew what the charges were, and was not held in isolation nor interrogated for a great length of time. He does not allege that he was coerced by physical threats or trickery. There is no allegation that the police deliberately postponed calling his mother to exert undue influence over him. He had substantial history of involvement in juvenile justice system and upon being read his rights, he did not ask for attorney or his mother.

Woods v. Clusen,
794 F.2d 293 (7th Cir. 1986).
Confession of 16 1/2 year old murder suspect who had no prior criminal record and no serious previous contact with criminal justice system was not voluntary; suspect was awakened early one morning by police officers hovering in his bedroom, was handcuffed and led away from home ostensibly for theft of chain saw, was stripped of his clothes, given institutional garb, but no shoes upon his arrival at police station, and was fingerprinted and photographed and led to interrogation room where he was confronted with graphic pictures of murder scene and subjected to interrogation.

Williams v. Peyton, 404 F.2d 528 (4th Cir. 1968).
Confession of 15-year-old boy who was enrolled in grammar school and had no prior criminal record at time of arrest, who was held for at least three days without being taken before juvenile judge, who was questioned intermittently by police about purse snatchings, who was questioned in police car after one victim identified him as boy who attempted to take her purse, and who was given no explanation or warning of his constitutional rights, was involuntary, and thus inadmissible in state prosecution.

Kentucky

Murphy v. Commonwealth, Ky., 50 S.W.3d 173 (2001).
Violation of statute requiring a peace officer to immediately notify a child's parent that the child has been taken into custody, and to give the parent notice of the specific charge and the reason for taking the child into custody, did not require suppression of juvenile's confession in prosecution of the juvenile as an adult for kidnapping, burglary, and assault, where juvenile had been advised of his *Miranda* rights before he confessed and there was no evidence presented that the confession was involuntary. Trial counsel did not move for a suppression hearing prior to introduction of the statement.

Davidson v. Commonwealth.,
Ky. App., 613 S.W.2d 431 (1981).
Confession of one juvenile regarding alleged vandalism of vacant house should not have been admitted in prosecution for criminal mischief in first degree where police officer failed to give juvenile his *Miranda* warnings and there was nothing in evidence that showed any reason why police officer could not have taken the time to explain to sister in charge of the juvenile what his constitutional rights were. Statute clearly placed on law enforcement obligation to notify person exer-

Continued on page 44

Continued from page 43
cising custodial control (pecc) about subject of interrogation and that juvenile was a suspect.

Other State Case Law

State v. Presha, N.J., 748 A.2d 1108 (2000).
In determining whether a juvenile or adult suspect's confession is the product of free will, courts assess the totality of circumstances surrounding the arrest and interrogation, including such factors as the suspect's age, education and intelligence, advice as to constitutional rights, length of detention, whether the questioning was repeated and prolonged in nature, whether physical punishment or mental exhaustion was involved, and the suspect's previous encounters with the law

State v. Davis, Kan., 998 P.2d 1127 (2000).
Where a juvenile consents to participate in a court-ordered psychological examination to determine whether the juvenile is to stand trial as an adult, the examiner is not required to advise the juvenile of his rights under *Miranda* as long as the information received during the examination is used solely in the juvenile waiver proceedings and is not introduced during trial or sentencing.

In re Christopher T., Md. App., 740 A.2d 69 (1999).
The fundamental right to counsel extends to juveniles in delinquency cases. The standard for waiver of counsel in a delinquency proceeding is necessarily as strict as the waiver standard that attaches in a criminal case. Any waiver of right to counsel in juvenile delinquency proceeding was ineffective without the court informing the juvenile of the nature of the allegations, the range of allowable dispositions, the assistance that a lawyer could provide, and the right to call cross-examine, and obtain witnesses.

Matter of B.M.B., Kan., 955 P.2d 1302 (1998).
Juvenile under 14 years of age must be given opportunity to consult with his or her parent, guardian, or attorney as to whether he or she will waive his or her rights to attorney and against self-incrimination; both parent and juvenile shall be advised of juvenile's right to attorney and to remain silent, and absent such warning and consultation, statement or confession cannot be used against juvenile at subsequent hearing or trial.

State v. Doe, Idaho App., 948 P.2d 166 (1997).
Juveniles are not treated as adults for purposes of assessing voluntariness of juveniles' confessions; consideration must be given to child's age, maturity, intelligence, education, experience with police and access to parent or other supportive adult

Isbell v. State, Ark., 931 S.W.2d 74 (1996).
Burden is on juvenile, even a 14-year-old, to ask to consult with parents before being questioned. Rule that admissibility of custodial statement is dependent upon showing that waiver was made voluntarily and intelligently obtains regardless of whether person said to have executed the waiver is entitled to protection of the Juvenile Code. In deciding whether it is convinced, according to totality of circumstances, that confession was voluntarily and intelligently given, appellate court considers whether special rights accorded to juveniles by statute were observed by authorities taking the statement.

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People v. Brown, Ill. App., 538 N.E.2d 909 (1989).
Even if juvenile's mother was not "shunted" from one police station to another during interrogations of juvenile, statements given by juvenile were still inadmissible on the ground that manifest weight of evidence did not reveal juvenile was advised of his *Miranda* rights and knowingly and intelligently waived them, where neither police officers nor State's Attorney who interrogated juvenile obtained his signature on waiver of rights form, and in fact, officials never even asked juvenile to sign one. When defendant later alleges statement was involuntary and State alleges contrary, fact that police did not even ask defendant to sign waiver of rights form justifies inference that they did not ask because they had not advised him of his rights or because he had not, contrary to State's assertion, agreed to waive his rights.

People v. Knox, Ill. App., 542 N.E.2d 910 (1989).
The receiving of an incriminating statement by a juvenile is a sensitive concern requiring great care, in absence of counsel, to assure the juvenile's confession was neither coerced or suggested, nor a product of fright or despair. A 15 year old defendant was arrested and charged with sexually abusing his sister. His mother arrived at the station house at about the time he was being interrogated, but police did not permit her to see him, nor did they tell him that she was present. The court held that: such conduct by police is inconsistent with the great care required where a juvenile's incriminating statement is received.

McIntyre v. State, Md., 526 A.2d 30, (1987).
Where 15-year-old defendant was arrested and charged with serious crime, denial of access to parent by police prior to extracting statement did not violate Fifth and Sixth Amendments.

Shelton v. State, Ark., 699 S.W.2d 728 (1985).
Age is not overriding consideration when reviewing circumstances of defendant's statement to determine whether it was

voluntary and spontaneous so that *Miranda* warnings were not required. If counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright, ignorance or despair.

Commonwealth v. Williams, Pa., 475 A.2d 1283 (1984).
There is no rebuttable presumption that a juvenile is incompetent to waive his *Miranda* rights without first having an opportunity to consult with an interested and informed adult. Fact that neither juvenile defendant nor his father was advised of defendant's *Miranda* rights prior to their private conference out of presence of officers did not render defendant's subsequent confession invalid, where at time of his arrest defendant was only six months away from his 18th birthday, defendant had considerable experience with criminal justice system starting at age 13 1/2 , defendant's physical condition was normal at the time of his arrest and detention, defendant was not subjected to physical or psychological abuse, was of normal intelligence and responsive to questions asked of him, both defendant and his father were informed of defendant's rights prior to the confession, defendant's father was present during the interrogation and when defendant waived his rights and made his confession, and defendant and his father had a continuing opportunity to confer in the presence of the authorities.

State v. Caffrey, S.D., 332 N.W.2d 269 (1983).
Juvenile's constitutional right against self-incrimination should be afforded additional protection. If counsel is not present when admission is obtained, court must take great care to assure that juvenile's confession was voluntary in sense not only that it was not coerced or suggested, but also that it was not product of ignorance of rights or of adolescent fantasy, fright or despair. Defendant's confession was not voluntary, given his age, 17, his relative inexperience with police procedures, his lack of friend or family beside him, lateness of hour, lengthy duration of questioning, officers' representations that they would persist in interrogation, and officer's misrepresentation that they could help defendant if he told them what had happened and that he would be forced to take lie detector test.

People v. Ward, N.Y. App. Div., 95 A.D.2d 351 (1983).
The totality of the circumstances compels the conclusion that defendant did not knowingly and intelligently waive his right to counsel, where, after his arrest, defendant was strip searched at the station house in the presence of several police officers, was then paraded into an area for questioning, a number of officers again being present, was induced to incriminate himself when advised that his mother had in effect abandoned him, was crying while making the statement and sought the services of an attorney shortly thereafter; such custodial interrogation rendered defendant's waiver ineffective and the resulting statement involuntary as a matter of law.

Commonwealth v. A Juvenile (No. 1), Mass., 449 N.E.2d 654 (1983).
To successfully demonstrate knowing and intelligent waiver by juvenile there should be a showing that parent or interested adult was present, understood warnings, and had opportunity to explain his rights to juvenile so that juvenile understands significance of waiver of these rights; for purpose of obtaining waiver, in case of juveniles who are under age of 14, no waiver can be affected without this added protection.

State v. Jackson, Ariz., 576 P.2d 129 (1978).
The fact that a juvenile's parents are absent while the juvenile is being questioned by police authorities or that 16-year-old murder suspect became emotionally upset when police officer advised him that he would be confronted with his alleged accomplices does not in itself entitle the juvenile to suppression of statements made during the questioning. Examination of circumstances surrounding juvenile suspect's confession, including fact that juvenile had a ninth grade education and was of average intelligence and that he had been given *Miranda* warnings several times and had not been subjected to any physical abuse or threats, sufficiently established the voluntariness of the juvenile's statement.

Interest of Thompson, Iowa, 241 N.W.2d 2 (1976).
There is no per se exclusionary rule in respect to confessions made by minors, nevertheless, the importance of securing for a minor under interrogation the advice and consultation of a parent, guardian, custodian, adult friend, or lawyer must be emphasized, and the failure to provide such support will throw a deep shadow of judicial distrust over a resulting confession; that considering the totality of the circumstances surrounding the juvenile's verbal confessions, including his mental weakness, emotional instability, judgmental incapacity, and the failure to provide him with requested counsel, his confessions were shown to be involuntary; that his spontaneous incriminating statements made prior to any direct interrogation by the police were not within the *Miranda* prohibitions, even though the juvenile was in custody; that the trial court did not permit cross-examination of the juvenile to stray beyond the matters testified to by him in the examination in chief; and that even after eliminating consideration of the juvenile's confessions, there was sufficient admissible evidence to establish beyond a reasonable doubt that he participated in the break-in.

In re State in Interest of S. H., N.J., 293 A.2d 181 (1972).
Fact that police obtained second confession in presence of father of 10-year-old boy immediately after boy was interrogated and confessed did not detract from impropriety of methods used to obtain first confession. Conduct of police in sending 10-year-old boy's father home from police station when father appeared in interest of his son may be sufficient to show that son's confession was involuntary. Recitation of *Miranda* warnings to boy of 10 even when they are explained is undoubtedly meaningless and such a boy cannot

Continued on page 46

Continued from page 45

make knowing and intelligent waiver of his rights. Before confession of juvenile charged with serious offense can be received in evidence, State has burden of establishing that juvenile's will was not overborne and that confession was product of free choice. Placing a young boy in the 'frightening atmosphere' of a police station without the presence of his parents or someone to whom the boy can turn for support is likely to have harmful effects on his mind and will. ■

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Client Suicide Threats: Protecting the Client and Ourselves

Introduction

This article discusses the law, discretion and the dilemma in the area of client suicide threats. The great news here is that we can give good service and protection to our clients in this area while being protected ourselves. Often this discretionary practice dilemma does not present itself as a light switch, an on/off question; rather, it requires subtle tuning, as does the adjusting of a light level with a rheostat switch.

Case Example

Consider a possible scenario: The juvenile court committed the client (a composite, not a single client) to the Department of Juvenile Justice (DJJ). Your client has committed serious offenses. She had a history of mental illness along with admission(s) to mental health facilities. Your client was 16-years-old at the time of her commitment and placement in a youth development center (YDC). You regularly visit your clients at the YDC where the DJJ placed the client.

The first time you visited her, your client discussed suicide. You weighed what you heard carefully, and asked your client if she wanted you to contact someone about her suicidal thoughts. She said definitely not. You suggested to her that you could call the psychiatrist who visited the YDC and express concern over her but not mention anything about suicide. Your client consented to this course of action, and you called the psychiatrist about this difficult client.

Your client continued this pattern at your next bi-weekly visit to the YDC. You ask her if she had told anyone at the YDC. She said no because telling this to YDC staff would mean a trip to the isolation unit for her. You urged her to let you tell someone. She insisted that you **not** tell anyone. You indicated that you might have to tell someone. Your client understood the meaning of confidential communications with one's lawyer and maintained that the current conversation was confidential. You concluded your visit, but the dilemma continued.

Your client and her problem and your dilemma stayed with you while you met other clients that day. After you finished visiting these clients, you spent a few minutes thinking over and weighing your client's situation and your responsibilities to her. Did client confidentiality rule here, or did you have discretion and a higher responsibility? What would be the impact on our ongoing attorney-client relationship? Should you try to get off this case? Before you leave, you reported your concerns about your client to the YDC's psychologist and treatment director. You continued to represent this client. You did the right thing, but why was this OK?

Applicable Law

The Kentucky Rules of Professional Conduct begin at SCR 3.130. Paragraph (a) of SCR 3.130-1.6 applies to confidentiality of information and bars a lawyer from "… reveal[ing] information relating to the representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b)." Paragraph (b) of the rule allows the lawyer to reveal client confidences as follows:

> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
> (1)To prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or …

At first glance, SCR 3.130-1.6 does not provide protection for the lawyer in the case where the client threatens or communicates thoughts of suicide, and the lawyer may need to reveal these client communications to a third party. Suicide does not constitute a "criminal act" in Kentucky. Comments [13] and [14] to SCR 3.130-1.6 do discuss revealing client confidences under the rule as "discretion[ary]" acts by the lawyer. The idea of discretion certainly underlies a lawyer's decision to report a client's suicidal intentions to appropriate institutional personnel. Still, SCR 3.130-1.6 and its comments do not appear to give complete guidance for the lawyer faced with a

client threatening suicide and perhaps claiming confidentiality to prevent the lawyer from reporting the threat(s).

SCR 3.130-1.14, entitled "Client under a disabilty," states:

> (a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of **[minority] age, mental disability** or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
> (b) A lawyer may seek the appointment of a guardian **or take other protective action with respect to a client,** only when a lawyer reasonably believes that the client cannot adequately act in the client's own interest. (Emphasis added).

SCR 3.130-1.14, especially the "or take other protective action" language in sub-section (b) begins to lend help to the lawyer in the client threatening suicide situation. Comment [1] to SCR 3.130.1.14 also provides help with this problem. The comment states in part that: "When a client is a minor or suffers from a mental disorder or disability, however, maintaining the ordinary client relationship may not be possible in all respects." (SCR 3.130-1.6 and 1.14 read nearly identical to their corresponding ABA Model Rules. The differences in the two sets of rules do not affect the question of the potentially suicidal client.)

ABA Informal Opinion 89-1530 recognizes the ABA Model Rule 1.6 duty of confidentiality. However, this opinion permitted the questioner to reveal to the client's doctor the lawyer's fear that client was abusing prescribed medication, and, thus had impaired ability "… to communicate or to reach adequately informed decisions[.]" *Id*.
This opinion goes on to state that:

> When a client's disability progresses to the point that [a normal lawyer-client relationship with full client autonomy] is no longer possible, and the lawyer reasonably believes that the client cannot adequately act in the client's own interest, Model Rule 1.14(b) permits a lawyer to seek the appointment of a guardian or **to take other protective action** on behalf of the client. Doing so inevitably requires some degree of disclosure of information to third parties. *Id*. (Emphasis added).

On the subject of linkage between Model Rules 1.6 and 1.14, Informal Opinion 89-1530 says that:

> Although there is no cross-reference to Model rule 1.6 in Model rule 1.14 or the Comment thereto, it must follow that the disclosures necessary for the lawyer to seek expert advice when there is reason to suspect impairment threatening serious harm to the client are impliedly authorized in order to carry out the representation within the meaning of Model Rule 1.6. Otherwise, Rule 1.14 could not work effectively and the Model Rules would be internally inconsistent. Disclosures necessary under Rule 1.14 would be prohibited by the provisions of Model Rule 1.6.
>
> Moreover, if a lawyer could take no action **to protect a disabled client** because doing so would require an unauthorized disclosure of information relating to the representation, irreparable harm to the client's interests might well result. *Id*. (Emphasis added).

So Informal Opinion 89-1530 puts together a synthesis of Model Rules 1.6 and 1.14 that allow us to protect our clients, even if it means protecting them from themselves. The last sentence of Comment [5] to SCR 3.130-1.14 lends further support to the proposition that it is right to seek help for a client under these circumstances. It says that: "The lawyer may seek guidance from an appropriate diagnostician [when deciding whether to reveal the confidences of a client who is under a disability]."

Informal Opinion 89-1530 favorably cites Informal Opinion 83-1500. 83-1500 permits lawyer disclosure to a third party where the client threatens suicide. 83-1500 interprets the old ABA Model Code instead of the Model Rules. However, it also cites ABA Model Rule 1.14 (at the time a proposed rule) for the proposition that the lawyer can protect the client in this manner.

Both Model Rules 1.6 and 1.14 (and SCR 31.130-1.6 and 1.14) require the lawyer (us) to exercise judgment and discretion when deciding to disclose client confidences. The rules speak of action based on reasonable beliefs. Number [8] of the "Terminology" section at the very front of SCR 3.130 defines reasonable belief as:

> "Reasonable belief" or "Reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

Number [7] of the "Terminology" section uses the "reasonably prudent and competent lawyer" as a standard for judging reasonable conduct. Do we reasonable lawyers have help for the tough calls? Yes.

The KBA Ethics Hotline Committee

SCR 3.530 mandates both formal and informal advisory ethics opinions. A Kentucky lawyer may seek such an opinion when "in doubt as to the propriety of … any professional act contemplated by that attorney …" *Id*. at (1). Ordinarily, the lawyer would seek the advice of her or his local Ethics Hotline Committee member ("district committee member" in the rule)

Continued on page 48

Continued from page 47

by written request, or in an "emergency" by telephone. *Id*. at (1). "The committee member to whom the request is directed shall attempt to promptly furnish the requestor with a telephonic answer and written informal letter opinion as to the propriety of the act or course of conduct in question." *Id*.

SCR 3.530 comes complete with protections. Section (3) of the rule states that "… no attorney shall be disciplined for any professional act on his part performed in compliance with an opinion furnished to him on his petition [request], provided his petition clearly, fairly, accurately and completely states his contemplated professional act."

Recently, I spoke with an Ethics Hotline Committee member in Lexington, Kentucky, Mr. Robert Turley, Esq., about seeking an informal opinion from an Ethics Hotline Committee member. Mr. Turley advises that, when seeking advice and protection under SCR 3.530 from the Ethics Hotline Committee member, the lawyer should "begin with full disclosure of the facts and circumstances of the situation." Then, "if the lawyer follows the advice [given, he or she receives protection] in relation to the ethics implications." The opinion rendered in these circumstances is an **informal** opinion. It is not published, and, in fact, it is "confidential" under SCR 3.530(7). (SCR 3.530(2), (4), (5), and (6) outline the procedure publishing formal ethics opinions and for challenging their publication.)

If you need to contact a Hotline Ethics Committee Member in your area, you can call the Kentucky Bar Center in Frankfort at (502) 564- 3795. The folks there will help you find a member in your area. As Mr. Turley says: "The Supreme Court adopted the rule in order to encourage lawyers who have questions about a proposed action." Mr. Turley also told me that these confidential "Hotline responses get filed with the Executive Director of the Kentucky Bar Association and the Chair of the Ethics Committee."

DPA Responses To Inquiries About Client Suicide Threats

Last fall, I spoke with several DPA lawyers about the subject of client suicide threats. The following statement by the Public Advocate, Ernie Lewis, sums up the consensus opinion that I found:

> I do believe it is the lawyer's obligation and duty to tell authorities when he/she has good reason to believe that the client is suicidal. Often this comes in the form of a simple statement by the client. In such situations it is imperative to talk with the client about the statement, and to let them know that you feel obligated to let someone know about this so that an evaluation can be done, so that a watch can be initiated, and other steps taken. In fact, I view the communication by the client as a cry for help. The client who does not communicate the intention frightens me more than the one who does.
>
> I agree that a lawyer has a heightened responsibility when a child is involved. Children have more dramatic mood swings. Their suicidal gestures can be quite real and tragic in consequence, and intervention is essential. At the same time, adult clients should not be ignored, as they too may utter to their lawyer the last statement about their intention.
>
> How to judge when the client has gone so far as to require letting someone know is difficult. I believe the lawyer is always conducting a type of clinical assessment. I think the lawyer develops over time the ability to spot certain words and other behaviors that result in a conclusion that the client is serious about intending to commit suicide.

The last paragraph in Ernie Lewis' statement gives us all a moment of pause. Ernie Lewis and all the other DPA lawyers who spoke with me about this subject would err on the side of caution when this subject presents itself in a client meeting or other setting. In Kentucky, we have the privilege and responsibility to fine-tune the rheostat, think it through, and help the client who intimates suicidal thoughts to their lawyer. Some jurisdictions might require disclosure when the lawyer encounters this serious situation. [*See* for instance Virginia state "Opinion 560" (4/10/84).]

Conclusion

Our laws favor protection of the client when we have reasonable fears about the client's possible self-destructive behavior. DPA tradition follows that line of thinking. Some of our challenges in this area are to fight the temptation to turn the light switch on or off with a difficult client and instead choose to thoughtfully tune the rheostat by exercising our best judgement while continuing to serve the most and needy client.

Thanks go to Ben Cowgill, KBA Chief Bar Counsel, Robert Turley, KBA Ethics Hotline Committee Member, Ernie Lewis, Dennis Stutsman, Rebecca Ballard DiLoreto, Tom Glover, Steve Mirkin, Rob Riley, and Gail Robinson. ■

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PRACTICE CORNER
LITIGATION TIPS & COMMENTS


Misty Dugger

Consolidate Cases Before Filing Notice Of Appeal

Often, our clients may have several indictments resulting in several separate cases before the trial court. As part of trial strategy, it may not always be appropriate to move to consolidate these separate cases before trial, depending upon the factual and legal issues presented. However, when multiple trial cases involving the same client are resolved together, either by trying them together or through conditional guilty plea, it would be helpful on appeal if trial counsel obtains a trial court order consolidating the cases before appeal. If not consolidated, the appellate court will treat each case as a separate appeal, raising the possibility of having a fragmented record on appeal. Additionally, if the records are certified separately by the circuit court clerk, there is the possibility that we will assign separate appellate counsel without knowing that there is a related record on its way up. Thus, in order to ensure your client gets efficient representation on appeal and that her appellate attorney possesses the entire, relevant circuit court record, always move to consolidate related cases before filing the notice of appeal.

~ Dennis Stutsman, Appeals Branch Manager, Frankfort

Three Easy Steps To Insure Exhibits Are Preserved In The Record

1. Pre-Mark Exhibits. This is an efficient way to keep track of your exhibits and to save time where there are many exhibits or a lengthy trial.

2. Photograph Large Exhibits. "By providing photographs of introduced exhibits, the Clerk when preparing the record will be able to put all your trial exhibits with the appealed record. This will allow the appellate judges to get a complete look at all the exhibits introduced at trial and make a complete appellate record."

3. Conduct Exhibit Count with Clerk at End of Trial. "Be sure all exhibits are in the clerk's possession and the record sheet of exhibits show correctly what is introduced and what was just marked for identification."

And as a final note, always review the appellate record with the clerk to be sure everything is in the record.

~Adapted from James E. Keller and William S. Cooper, "Views From the Bench About Trial And Appellate Practice" in UK/CLE *Evidence and Trial Practice*, October 2001.F4-F9.

Include the District Court Hearings in the Record on Appeal

This is especially important when district court testimony is used to impeach or cross-examine trial witnesses or if representing a youthful offender. Often an attorney will cross-examine or impeach a trial witness by referencing the witness's testimony at a prior preliminary hearing. However, without including a copy of the transcript or recording of the preliminary hearing, the appellate analysis of this impeachment is confined to the narrow verbal exchange during the cross-examination. To insure that the importance of impeachment or preliminary hearing testimony is recognized on appeal, always introduce a copy of the preliminary hearing into the record for appeal and /or list it in the designation of record.

The juvenile and/or district court file and proceedings are especially important if your client is a youthful offender. Attorneys representing youthful offenders, should always ask to have the district court proceedings and file included in the record and designate these proceedings in the designation of record.

~ Misty Dugger, Appeals Branch, Frankfort
Tim Arnold, Juvenile Post-Disposition Branch, Frankfort

Websites Worth Checking Out

These sites may be of interest to attorneys, investigators, mitigation specialists, law clerks, and legal assistants.

- www.expertwitness.com
- www.sentencingproject.org (National Association of Sentencing Advocates)
- www.aafs.org (American Academy of Forensic Sciences)
- www.capdefnet.org (Capital Defense Network)
- www.clinicalsocialwork.com
- www.statelocalgov.net (nationwide state and local government information)
- www.pac-info.com (variety of public record information by state)
- www.onelook.com (dictionary and translation service)
- www.legalethics.com (ethics opinions, news, and advice nationwide)

~Adapted from "Interesting Websites", in *for The Defense*, Vol. 10, Issue 6 (June 2000) and "Check out These Sites!", in ABA/*The Young Lawyer*, Vol. 6, No. 2 (November 2001).

Practice Corner needs your tips, too. If you have a practice tip to share, please send it to Misty Dugger, Assistant Public Advocate, Appeals Branch, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky, 40601, or email it to Mdugger@mail.pa.state.ky.us. ■

DPA's Interview Fair 2002

Gill Pilati

On February 7 & 8, 2002 the Kentucky Department of Public Advocacy conducted it's second annual Interview Fair.

This year's interviewees were primarily graduating law students that successfully "interned" with the agency.

Among those in attendance were graduating law students representing all of Kentucky's Schools of Law. These students interviewed for various statewide staff attorney vacancies for offices located in Frankfort, Murray, Paducah, Bowling Green and Hopkinsville.

Potential employment offers were made with the invitation for a "new beginning" as a Public Defender serving Kentucky's Indigent.

If you are interested in employment with DPA, contact me:

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The Occasion of the 100th Exoneration of a Death Row Inmate in America

Statement of Robert E. Hirshon, President, American Bar Association, April 9, 2002:

The release and exoneration of Ray Krone in Arizona, the 100th person in the United States on death row found to be innocent, confirms what the ABA has been saying since 1997 - our current death penalty system is deeply flawed. Until we can assure that due process is accorded to persons charged in capital cases we should not impose the ultimate sanction.

As has been said, "A system that will take life must first give justice." The ABA continues to urge our leaders in each state and in the federal government to cease executions until we achieve that goal.

Statement by The Justice Project On the 100th Death Row Exoneration

Today our nation reached a shameful milestone of 100 death row exonerations. 100 innocent lives were put at risk, 100 victim families had to relive the horror of the crime, and 100 times our system failed us in its most important task.

What we do not know is how many other innocent men and women are on death row, and how many may have been executed.

Our nation's death penalty system is broken. 100 innocent people have been exonerated, nearly 68% of all death penalty appeals are reversed, and studies show that executions have more to do with economics, race, geography and just plain bad luck than crime.

The 100th exoneration should finally quiet the debate on whether there is a problem with our capital punishment system, and focus the debate on how to fix it. That fix should start with the Innocence Protection Act, which guarantees access to DNA testing and encourages states to adopt real standards for capital defense attorneys.

The 100th exoneration drives home the need for policies to ensure that innocent people will not waste years of their lives on death row while the guilty remain at large and, most importantly, to prevent the "ultimate nightmare" - the execution of an innocent person.

Wayne F. Smith
Executive Director
The Justice Project
http://www.CJReform.org/Newsroom/100Exon

The Justice Project is a national, non-profit, non-partisan organization focusing on identifying and solving issues of fairness in our judicial system. ■

DPA LIBRARY WEBPAGE

Two new publications from the Criminal Justice Council are now on-line and available through the DPA library webpage (via link to the CJCs website: http://www.kcjc.state.ky.us/).

If you need to locate Criminal Justice agencies throughout the state, try the Criminal Justice Resource Guide. It lists most groups involved in Criminal Justice Functions.

The true goldmine on CJCs website is the Sourcebook of Criminal Justice Statistics. It gives all sorts of figures about population and crime statistics for Kentucky. Only the 2000 edition is currently available.

Both of these files can be accessed via the library webpage at www.dpa.state.ky.us/library.html. The links appear at the bottom of the page in the suggested links section. Both files are pretty good size and are in PDF format so it may take a while for them to open. I've looked at both of them and they are worth the wait, especially the sourcebook.

— Will Hilyerd, DPA Librarian

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NOTE: DPA Education is open only to criminal defense advocates.

For more information:
Contact Patti Heying at
(502) 564-8006, Ext. 236,
pheying@mail.pa.state.ky.us or
http://dpa.state.ky.us/train/train.htm

For more information regarding KACDL programs call or write: Denise Stanziano, 184 Whispering Oaks Drive, Somerset, Kentucky 42503, Tel: (606) 676-9780, Fax (606) 678-8456, E-mail: KACDLassoc@aol.com

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For more information regarding NLADA programs call Tel: (202) 452-0620; Fax: (202) 872-1031 or write to NLADA, 1625 K Street, N.W., Suite 800, Washington, D.C. 20006;
Web: http://www.nlada.org

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For more information regarding NCDC programs call Rosie Flanagan at Tel: (912) 746-4151; Fax: (912) 743-0160 or write NCDC, c/o Mercer Law School, Macon, Georgia 31207.

**** NLADA ****

Defender Advocacy Institute
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